No. 7344

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO. (a corporation),

Appellant,

vs.

WILLIAM C. McDUFFIE, as Ancillary Receiver of Richfield Oil Company of California,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEE.

This action was *originally* instituted by plaintiff (now appellee) for the purpose of preventing the appellant bank from exercising its alleged banker's lien and right of off-set upon certain foreign drafts claimed by appellee to have been previously deposited with appellant solely for collection, and to enjoin appellant from exercising its alleged right of off-set when the proceeds of said drafts came into its possession.

Subsequent to the commencement of the action, appellant collected $144,758.79 representing the net

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(NOTE): To subserve the convenience of the court we have attached hereto in an appendix Plaintiff's Exhibit 117 consisting of Schedules A to L inclusive. These schedules will assist the court in its consideration of the evidence. They were explained in detail by the witness Pope. (R. 326-35.)

proceeds of all of said drafts, which sum it appropriated to its own use under its alleged right of off-set, in partial payment of certain indebtedness then due to it from Richfield Oil Company.

THE PENDING CONTROVERSY, WHEN DETERMINED, WAS AN ACTION AT LAW AND NOT A SUIT IN EQUITY.

At the time this action was instituted, only the smallest of the drafts herein involved had been collected in full and a portion only of another small draft not involved in this appeal. The remaining drafts were in process of collection. In order to obtain appropriate relief under the circumstances then existing, it was essential that the controversy should take the form of a suit in equity. Prior to its trial, however, all of the drafts in controversy had been collected by appellant. At the conclusion of the trial, appellee moved the court for a judgment in its favor for the sum of $144,758.79, being the proceeds of said drafts, together with legal interest thereon. (R. 466.) It was then stipulated by the parties

> "that the amended bill of complaint be considered amended so as to pray for a money judgment." (R. 466.)

The decree entered by the lower court directed appellant to pay to appellee $163,303.85, being the principal of the proceeds of the drafts to which appellee claimed it was entitled with legal interest added thereon, together with its costs. (R. 198-9.)

It must be apparent to the court that, regardless of its nature when commenced, before trial the action assumed the attributes and characteristics of an action at law. At the time of trial, appellee neither sought nor was entitled to equitable relief. His remedy at law was adequate, and the only relief to which he was entitled was a money judgment.

That counsel for appellant were then of the opinion that the action was one at law is shown by the fact that at the commencement of the trial,

> "counsel for both parties stipulated that trial by jury be waived." (R. 200.)

Under these circumstances, upon this appeal the action must be deemed to be an action at law and controlled by the rule stated by Judge Sawtelle in *Clements v. Coppin,* 61 Fed. (2d) 552, as follows:

> "It is well settled that the finding of the trial judge based on conflicting testimony taken in open court will not be disturbed on appeal." (Citing cases including *U. S. v. United Shoe Mach. Co.,* 247 U. S. 32; 62 L. Ed. 968.)

In *Babbitt Bros. Trading Co. v. New Home Sewing Mach. Co.,* 62 Fed. (2d) 530, (C. C. A. 9) the court at page 533, said:

> "There is a sharp conflict in the evidence and of course it is not incumbent upon this court to reconcile such conflict or to weigh the evidence; our sole duty is to determine whether there is any substantial evidence tending to support the findings of the court below. We are prepared to say, however, that the findings of the court are fully sustained by the evidence."

See also:

Independence Indemnity Co. v. Sanderson, 57 Fed. (2d) 125, (C. C. A. 9.)

Even though this court should consider this action as one in equity rather than one at law, nevertheless inasmuch as all of the witnesses testified in open court before the trial judge, the findings of the lower court are presumptively correct and will not be disturbed unless clearly wrong.

In *McCullough v. Penn Mutual Life Ins. Co.,* 62 F. (2d) 831, which was a suit in equity, this court, speaking through Judge Wilbur, said:

> "The trial court after hearing the witnesses who testified in open court, and upon due consideration of several written statements made by appellant in connection with * * * found the fact to be * * *. These findings are supported by the admission of appellant and by other substantial evidence adduced by witnesses appearing before the court, and under well settled rules these findings cannot be disturbed."

In *Collins v. Finley,* 65 Fed. (2d) 625, this court, through Judge Sawtelle, said:

> "As was said by Judge Rudkin in the case of Easton v. Brant, 19 F. (2d) 857, 859, 'The appellant is confronted by two well established principles of law from which there is little or no dissent; first, the findings of the chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal save for obvious error of law or serious mistake of fact. * * *' (Citing cases.) * * *

> This consideration alone requires an affirmance of the trial court's findings on the facts."

In the case of *U. S. v. McGowan,* 62 F. (2d) 955, this court, through Judge Wilbur, stated:

> "It is true that in an equity case the evidence is reviewed by this court, but it is a fundamental rule that where the witnesses testify in person before the trial judge he is in a better position to pass upon the credibility of a witness than this court, and we will follow the decision of the trial judge unless it is clearly apparent that his decision is erroneous." (Citing cases.)

In *Butte & Superior Co. v. Clark-Montana Co.,* 249 U. S. 12; 63 L. Ed. 447, Mr. Justice McKenna states the rule as follows:

> "The Circuit Court of Appeals affirmed the findings, saying, by Circuit Judge Gilbert: 'The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal.' And we said in *Lawson v. United States Mining Co.,* supra, of the conclusion of the Circuit Court of Appeals in such case—and the concession is as great as appellant is entitled to—'That if the

testimony does not show that it (the conclusion of the court) is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong.' The findings accepted, the conclusion of law must be pronounced to be of necessary sequence."

See also:

Suburban Improvement Co. v. Scott Lumber Co., 67 F. (2d) 335;

Benedict Coal Corp. v. Fidelity etc. Ins. Co., 64 F. (2d) 347;

Exchange Nat. Bank etc. v. Meikle, 61 F. (2d) 176;

New York Insurance Co. v. Simons, 60 F. (2d) 30;

Karn v. Andresen, 60 F. (2d) 427;

Mayfield v. Pan American Life Ins. Co., 49 F. (2d) 906;

Kennedy v. White Bear Lake, 39 F. (2d) 608;

Shell Eastern Petroleum Products v. White, 68 F. (2d) 379.

FOREWORD.

In its findings of fact, after a full consideration of all the evidence introduced by the parties hereto, the court, among other things, found:

1. That all of the drafts deposited by Richfield Company with appellant were deposited for collec-

tion. (R. 184.) The integrity of this finding is conceded by appellant.

2. That only the so-called short-term drafts of an aggregate amount slightly in excess of the amount of the acceptances issued by appellant bank and having a maturity earlier than the maturity of said acceptances, the proceeds of which could be and actually were received by appellant bank at least one day before the maturity date of the acceptances secured thereby, were deposited as security under the acceptance agreements. (R. 189-90.)

3. That all foreign drafts were deposited upon the agreement that they and their proceeds should be entirely separate and apart from all other financial obligations and transactions theretofore or thereafter to be conducted in the ordinary course of business between said parties. (R. 190.)

4. That none of the drafts or their proceeds which are the subject of this appeal was deposited by the Richfield Company with appellant bank as security under said acceptance agreements (R. 193), but all of said drafts were deposited under and in reliance upon said agreement that they and their proceeds should be entirely separate and apart from all other financial obligations and transactions theretofore or thereafter to be conducted in the ordinary course of business between said parties. (R. 184-5.)

5. That at or about the time of the appointment of the receiver it was agreed between said receiver and the creditor banks, including appellant, that each of said banks would forthwith transfer the deposit

account so held by it in the name of Richfield Company to that of said receiver, and would carry on and conduct said account in the ordinary course of business and would not exercise any claim of banker's lien upon said account, including collections, except such collections as were security for the acceptances theretofore issued by appellant, and that such agreement was made in order to enable said receiver to carry on and transact the affairs of said Richfield Oil Company for the benefit of the creditors until the termination of said receivership. (R. 190, 191.)

If this court concludes, as we submit it must, that there is evidence in the record sufficient to sustain the finding of the lower court that the drafts here involved were not deposited as security under the acceptance agreements, then it only becomes necessary for the appellee to establish to the satisfaction of this court that there is sufficient evidence in the record to sustain **either** the agreement mentioned in subdivision 3 hereof **or** the agreement referred to in subdivision 5 hereof, each of which was found by the court to have been made. Furthermore, if this court concludes that there is sufficient evidence to establish *either one of these two agreements it will be unnecessary for it to pass upon the sufficiency of the evidence to sustain the other agreement.*

STATEMENT OF FACTS.

While, as we have already pointed out, unless the findings of the lower court are entirely lacking in sub-

stantial evidentiary support, the judgment entered herein must be affirmed,—in view of the attack made by appellant upon the lower court's decision, and having in mind the claim asserted by appellant (which, however, we dispute), that this is a suit in equity and therefore this court is not bound by the findings of the lower court, but on the contrary is entitled to weigh the evidence and in effect try the case *de novo*,—we believe it necessary to descend into greater detail in the narration of the facts than would otherwise be required.

UNCONTROVERTED FACTS.

For a number of years prior to October 1, 1930, the Richfield Oil Company was engaged in the business, among others, of producing, refining, selling and distributing oil and its various by-products, its principal place of business being in Los Angeles, California. For some years prior to October, 1930, it maintained an export and foreign department through which it negotiated for the sale of and sold to foreign customers its commodities and products. Subject to the instructions and directions of the executive officers of the Richfield Company, this export and foreign department was in charge and under the control of Robert L. Hall. (R. 337-8.)

In the conduct of its business, the Richfield Company maintained commercial accounts with a number of substantial banking institutions located principally in California, but some of which were scattered throughout the north and east. For at least a number

of months prior to October, 1930, the Richfield Oil Company was indebted in a sum in excess of $10,000,000 to twelve of these banking institutions, no part of which was secured: $625,000 of this unsecured indebtedness, represented by a promissory note maturing October 10, 1930, was owing to appellant bank. (R. 218.)

A substantial portion of the foreign business engaged in by the Richfield Company was done on credit. Aside from the occasional use of letters of credit, drafts would be drawn by the company upon its foreign customers the terms of which would accord with the agreement upon which its commodities were sold to them. Where the sale was practically a cash transaction, a sight draft would be drawn. If the sale was made upon credit alone, a draft would be drawn for acceptance, payable at the end of the credit period. Where the terms of sale involved part cash and part credit, a sight draft would be drawn, representing the cash payment and a term draft for the credit period. After the goods were shipped, the draft or drafts, accompanied by the shipping documents, would be deposited with the bank for collection through its foreign correspondent. In the instances where both a sight draft and a term draft were drawn, the documents were ordinarily deliverable upon payment of the sight draft and upon acceptance of the term draft.

One of the principal foreign customers of the Richfield Company was Birla Bros., located at Calcutta, India. The agreement upon which the Richfield commodities were sold to this customer was one-half cash

represented by a sight draft and the remaining one-half payable in 180 days, represented by a draft payable 180 days after its acceptance. The documents representing each shipment to Birla Bros. were deliverable to it upon payment of the sight draft and the acceptance of the 180-day draft. (R. 338.)

On account of its financial necessities, for some considerable period prior to October, 1930, the Richfield Company had discounted most of its foreign drafts with the Security-First National Bank of Los Angeles. About this time the Richfield Company became dissatisfied with the manner in which its foreign collections were being handled and concluded to transfer this portion of its business to appellant bank. (R. 339-40.)

With this purpose in mind, during August, 1930, Robert L. Hall, manager of the export and foreign department of the Richfield Company, after conferring with one or more of his superiors, came to San Francisco and engaged in a conference with W. G. Gilstrap, assistant manager of the Foreign Department of appellant, informing him that if agreeable to the bank, the Richfield Company would be glad to turn over to it practically all of its foreign collections. During the course of the discussion, the use of bank acceptances was discussed. The saving to the Richfield Company as the result of the use of such acceptances was mentioned, and the procedure surrounding the execution and release of acceptances by the bank was described and given consideration. It was finally understood that Hall should return to Los Angeles, and if the use of acceptances was agree-

able to the executive officers of the company, such plan would be thereafter pursued. Thereafter and on October 1, 1930, Hall telephoned to Gilstrap, requesting him to send to the company by mail, forms of acceptance agreements and acceptances, which was done. (R. 340 et seq.)

Employed in the Foreign Department of the Richfield Company was one Homer E. Pope, whose duties consisted in giving attention to the foreign collections. All shipping documents, letters of transmittal and drafts were submitted to him for examination and passed through his hands. A complete and detailed record of all collections and their approximate due dates was constantly kept by him. (R. 249.)

On the morning of October 6, 1930, Mr. Hall and Mr. Pope called at appellant bank, the latter having in his possession an executed form of acceptance agreement, as well as proposed acceptances, fourteen in number, signed by the Richfield Company aggregating $150,000, being the total amount of acceptances specified in the acceptance agreement. This trip was taken after Mr. Hall had discussed with some of the executive officers of the company the propriety of utilizing acceptances and had reported to them the substance of the conversation occurring between himself, Gilstrap and other officials of the bank upon his August visit. (R. 345.) Mr. Pope was brought to San Francisco in order to thoroughly familiarize himself with the mechanics surrounding the execution and release of acceptances and the details of the arrangement between the Richfield Company and the bank. This information was essential to enable him to prop-

erly and correctly keep his records respecting foreign drafts and collections. The acceptance agreement, together with the acceptance forms, all executed by the Richfield Company, were delivered by Pope to Gilstrap. (R. 260-1.)

With respect to the matters above narrated, the evidence is without dispute. These facts are mentioned merely by way of introduction to the matters in controversy, to which under appropriate titles and as sequentially as possible reference will now be briefly made.

CONTROVERTED FACTS.

It was agreed that the foreign collections should be deemed to be separate and apart from other business of Richfield with, and its financial obligation to appellant bank.

It is claimed by appellee that it was agreed by appellant that ALL of the foreign drafts deposited with it by Richfield for collection should be considered and deemed to be and treated as entirely separate and apart from all other transactions occurring between Richfield and appellant, including Richfield's indebtedness to the bank. That the integrity of this agreement has been demonstrated by the evidence cannot be seriously disputed.

It has frequently been held that in reaching a determination with respect to matters in controversy, the court is justified in giving consideration to whether the position assumed by a litigant is in ac-

cord with the probable conduct of a reasonable person similarly situated. That the agreement here asserted would have been insisted upon by any reasonable business man under like circumstances must be obvious.

At the time of the inception of the transactions here being considered, the Richfield Company owed appellant an unsecured indebtedness of $625,000, evidenced by a promissory note which was to mature on October 10, 1930. In the absence of any agreement to the contrary, or circumstances inconsistent with its exercise, the moment such unsecured indebtedness matured, the bank would have been legally authorized to exercise its banker's lien upon every draft deposited with it for collection, and, upon the collection of such drafts, would have been legally entitled to appropriate the proceeds thereof to offset such unsecured indebtedness. Under like conditions, upon the sale or discount of any acceptance executed and released by it, provided the proceeds came into the bank's possession, it would have had a right to apply such proceeds in payment, either in whole or in part, of such indebtedness.

The right of a bank to exercise its banker's lien as well as its right of set-off was known to Hall, as it was known to the other executives of Richfield. (R. 341.) At this time the Richfield Company was and thereafter continued to be in dire need of funds. (R. 341.) Its profit upon its foreign business, which has been entirely built up by Hall, was almost negligible in character. The cost of producing and making ready its commodities for foreign shipment was

required to be advanced by it. The freight charges upon these transactions had to be paid in advance of shipment. Faced with these conditions, it could ill afford to take the chance of depositing with a bank foreign collections involving large sums, unless it was understood that neither the drafts themselves nor their proceeds, when collected, could be utilized by the bank in extinguishment, either in whole or in part, of an unsecured indebtedness far in excess of the collections entrusted to it. The executive officials of Richfield, as well as Hall, knew that many banks substantial in character existed in California, to which no indebtedness was owed by Richfield, and to which its collections could readily have been entrusted without being menaced by the possible exercise of a banker's lien or right of offset. That the Richfield Company would deposit its foreign drafts for collection with appellant and permit it to receive the proceeds of the acceptances issued and released by it, in the absence of a special agreement preventing the exercise of its banker's lien or right of set-off, is inconceivable.

In giving consideration to the evidence bearing upon this subject, the court must conclude that the probabilities are that the agreement contended for by appellee was made. The evidence upon this subject, however, while to some extent in conflict, is convincing that the agreement testified to by Hall and Pope was actually entered into.

It will be recalled by the court that although Hall was manager of the Foreign Department of Richfield and responsible for its proper functioning, before

coming to San Francisco he had a conference with its officials, during the course of which the purpose intended to be achieved by him was given consideration and discussed. In fact, in making the arrangements with the bank, he was following the orders given him by these officials. (R. 346.) Furthermore, he was interested in the financial success of his particular department, because upon such success depended the amount of the compensation to which he was entitled. Indeed, as has already been intimated, within a period of four years, Hall built up the foreign trade business of Richfield in various foreign ports. (R. 337.) It would indeed be remarkable if, under the proven circumstances Hall would have failed to insist upon the agreement testified to by him. That the agreement was made is clearly shown by his evidence. In August, 1930, during the first conference occurring between him and Gilstrap, Hall testified:

> "I discussed with him the general situation of the Richfield Oil Company's collections and stated that I was contemplating turning over all of the Richfield's collections in foreign countries as far as possible to them. I explained to him that I would be responsible as far as possible for those collections and watch them. * * * I asked him to remember that any transactions were to be considered separate from other transactions of the Richfield Company — the entire transactions, monetary, the collection of drafts for us or any other business connected with the Foreign Department of Richfield Company." (R. 340.)
>
> "I stated to him that I had an interest in all collections which were emanating from the For-

> eign Department and that I wanted him to consider that it was a separate business arrangement from any other business which Richfield had with Wells Fargo Bank. Mr. Gilstrap said that he understood my position." (R. 341.)

After his preliminary conference with Gilstrap, Hall was taken by Mr. Hellman to Mr. Lipman, president of the bank. To this conversation Hall testified:

> "He (Lipman) said that he would give a further line of credit based on foreign drafts in the amount of $150,000 or thereabouts and see how it would work out. I then made it particularly strong to Mr. Lipman as to my position as manager of the Foreign Department; that I would continue to give my very careful attention to the drafts of the Foreign Department for two reasons; that I had a personal interest in the collections of the Department, *and that I wanted it considered to be a separate transaction from any obligations or any transactions other than those of the Foreign Department—Richfield obligations I mean.* Lipman then said, 'That is good' or 'That is excellent.'" (R. 343.)

This conversation was later reported by Hall to Mr. Gilstrap. (R. 343.) Upon cross-examination he reiterated that he had stated to Mr. Lipman

> "that it was to be understood that this further credit was to be kept separate and be a distinct arrangement with the Foreign Department." (R. 358.)

Upon the visit of Hall and Pope to the bank on the morning of October 6, 1930, this arrangement was

again made the subject of discussion. According to Hall, after Gilstrap, at the request of Pope, had telephoned to Mr. McKee, Hall

> "reiterated my former conversation with Mr. Gilstrap that if the acceptances were used it must be definitely understood that it was a separate transaction from any other transaction in a monetary way which Richfield had with Wells Fargo Bank. I was following orders in that respect from Mr. McKee." (R. 346.)

This testimony is corroborated by Pope who testified:

> "During the course of the conversation Mr. Hall said that he wanted the transaction with the Foreign Department considered a thing apart from the regular transactions of Richfield with the bank." (R. 264.)

Upon cross-examination it was attempted to be shown that the first time Pope ever heard from Hall that he had an interest in the Foreign Department was when he was having a dispute with the receiver respecting the payment of his share of the profit of the export department. This was denied by Pope, who testified:

> "I know that once he made that statement before the receivership. That was during our talk with Mr. Gilstrap. As I remember it, the substance of his statement was that he wanted the Foreign Department business of Richfield kept as a separate and distinct transaction from other business that Richfield might do with the Wells Fargo Bank." (R. 325-6.)

While this testimony given by Hall and Pope was denied by Gilstrap and Hellman, it is apparent that in this respect the memories of the latter are clearly at fault. It appears without dispute that the subject matter of this agreement was discussed by Hall with both of these officials during his conferences with them and other officials at the bank in May, 1931, after he had been informed that the bank had exercised its so-called banker's lien upon the drafts herein involved and intended to retain their proceeds. Immediately thereafter, Hall came to San Francisco to protest against such action and endeavored to have the drafts as well as their proceeds forthwith released. During the discussions which followed, one of the reasons given by Hall why the action taken by the bank was without justification was that it had made the agreement to keep these transactions separate and apart from all other business with, and financial obligations of Richfield. On this subject he stated:

> "I told Mr. Gilstrap, Mr. Eisenbach and Mr. Motherwell about my situation with the Richfield Oil Company, that it was on a commission basis, and that I had an interest in all the collections. I refreshed their memory that I had brought that up with them before and that I had elaborated on this to a great extent. * * * I reiterated all the statements that I had made to Mr. Gilstrap and Mr. Eisenbach with reference to the way I understood the agreement." (R. 350-1.)

Upon cross-examination he stated:

> "I brought up every argument on the agreement which I had with Wells Fargo with respect

> to the separateness and distinct part of the acceptance transaction with the Wells Fargo Bank. * * * Mr. Gilstrap stated that it was something that was beyond his control, that it was exercised on the instructions of Mr. Lipman, and that he had nothing to do with it whatsoever, and that it would have to be taken up with Mr. Lipman in order to have the banker's lien removed." (R. 364.)

These statements, according to Hall, were not denied. Hall testified:

> "They did not deny any of the statements which I made to them respecting the negotiations occurring at the time of the inception of this business or respecting the agreement with the receiver." (R. 351.)

This testimony of Hall was corroborated by Gilstrap upon both direct and redirect examination. (R. 387-410.)

The existence of this agreement was likewise given recognition by Gilstrap in his conversation with Hall had shortly after he had informed Hall of the cost of cabling the proceeds of the three Birla Bros. drafts to San Francisco during the course of which he told Hall what the bank intended to do. With respect to this conversation, Hall testified:

> "He stated that Wells Fargo Bank was going to grab that money. I asked him why and he stated that they were going to take it, exercising a lien on it for other indebtedness owed the bank. I stated that I was very surprised since they had agreed not to touch any of the collections of the foreign department of the Richfield

> Oil Company. He said he was sorry but that was the decision of the bank." (R. 350.)

It is unnecessary, however, to argue further that the agreement contended for was entered into because appellant itself removed the issue from controversy through Frederick L. Lipman, its president, who was called as a witness on its behalf. He was the officer to whom all the other officials of the bank referred in determining the credit which should be extended to the Richfield Company on its foreign collections. To him Hall was finally brought after conferring with Gilstrap and Hellman. That the agreement testified to by Hall was in fact made is demonstrated by the testimony of Lipman as follows:

> "It seems to me that as the conversation came to an end Mr. Hall said something to the effect that he represented the foreign department and not the general treasury relations of the company, *and he did not want the two mixed up; he wanted them kept separately.*" (R. 449.)

This testimony of Mr. Lipman is corroborated by Frederick J. Hellman, vice-president of appellant in charge of the Foreign Department. (R. 436.) Upon direct examination, he stated that after he and Mr. Hall had had some brief conversation with Mr. Gilstrap, he took Mr. Hall downstairs to the office of Mr. Lipman, and that he remained there during the conversation which ensued. (R. 436.) Testifying to what the conversation was, he states:

> "As I remember it, we then stood up and were going out the door, and Mr. Hall said to Mr. Lipman, *'Mr. Lipman, I want it understood'*—

> NO, NOT THAT. He said, 'You must realize that I am not in the financial end of the business; that I am only the manager of the foreign department, and I will have to get the consent of my superiors to put this credit through.' He further said that he knew we were giving them a line of credit of $625,000, and that if this acceptance credit was going to interfere with the loan line downstairs, he knew they would not consent to it, and he wanted the acceptance credits separate from the loan downstairs." (R. 438.)

Before passing to the cross-examination of this witness upon this subject, we believe it proper to direct the court's specific attention to the rather significant language of Mr. Hellman, in which he started to narrate what Mr. Hall said to Mr. Lipman, viz.: "Mr. Lipman, I want it understood—" and then suddenly corrected himself, saying, "No, not that." A brief examination of the testimony of Hall will show that the language used by Mr. Hellman and then repudiated by him is almost identical with the language which Mr. Hall claims he used in his preliminary statement to Mr. Lipman. (R. 343.)

On cross-examination, Mr. Hellman testified:

> "Mr. Hall said that he wanted these acceptance transactions to be considered separate from the loan line. * * * *He used the word 'separate', and he referred to the loan of $625,000. The essence of the statement is that he wanted it considered separate from the loan line of $625,000."* (R. 445-6.)

In view of the testimony of Lipman substantiating the testimony of Hall and Pope bearing upon this

subject and the corroborating testimony of Hellman, whether the so-called Hall agreement asserted by appellee was actually entered into is no longer within the realm of speculation.

Hall agreement given recognition by subsequent conduct of appellant bank.

But aside from this conclusive evidence establishing the making of the agreement, the subsequent conduct of appellant clearly establishes that until May 8, 1931, when, under circumstances referred to at a later stage of this brief, it attempted to seize the proceeds of some of these drafts, the existence of the agreement was constantly given recognition by it. As already stated, the promissory note executed by Richfield Oil Company evidencing its unsecured obligation to appellant matured on October 10, 1930. Aside from the bank's letter of February 26, 1931 (Plff's. Ex. 107), to which reference will also later be made, no attempt was made by appellant to exercise its alleged banker's lien or right of set-off until May 8, 1931. In the absence of the agreement under discussion, at any time after October 10, 1930, appellant would have had the right to exercise its alleged banker's lien upon the drafts deposited with it for collection or its right of set-off against their proceeds. In making this statement, we are eliminating from consideration the agreement between appellant and the receiver and other bank creditors of Richfield, evidenced by the wire of January 16, 1931 (Plff's. Ex. 3), to which reference will be made later, but which is not here important.

Notwithstanding such alleged right, not only did appellant fail to exercise such banker's lien or right of set-off until May 8, 1931, but between October 10, 1930, and May 8, 1931, it credited to the account of Richfield Company and thereafter to the receiver, the net proceeds of certain drafts theretofore collected by it totaling $39,469.57. (Plff's. Ex. 117.) In this connection it should also be noted that of these sums, $31,719.99 was so credited without any request of any kind emanating from Richfield Company or its receiver. (R. 333-4.) The remaining $7749.58 was deposited to the receiver's account in accord with appellant's letter of March 5, 1931 (Plff's. Ex. 108) after the receiver had called its attention to its wire of January 16, 1931 (Plff's. Ex. 3), to which reference will be made in another subdivision of this brief.

During this seven-months' period, appellant kept in touch with and had full knowledge of Richfield's financial condition. During the whole of this period appellant undoubtedly was just as anxious to obtain payment of the unsecured indebtednes due it by Richfield as it was on May 8, 1931. Its failure to exercise its alleged banker's lien and right of set-off between October 10, 1930, and January 16, 1931, is directly traceable to its recognition of the so-called Hall agreement. Such failure after January 16, 1931, was due not only to the so-called Hall agreement, but because of its agreement evidenced by its telegram of January 16, 1931 (Plff's. Ex. 3), which, together with the circumstances under which on May 8, 1931, appellant seized the moneys here involved will later be given consideration.

It must be obvious to the court from the evidence to which reference has been made, that when the arrangements were made to turn over the Richfield's collections to appellant, it was understood by the representatives of the Richfield Company and the officials of the bank that the entire foreign business of the Richfield Company should be kept, and deemed to be, separate and apart from all other transactions and business with the bank(including Richfield's then unsecured indebtedness to the bank.

The drafts, the proceeds of which are herein involved, were deposited with appellant for collection only, and not under the acceptance agreements or as security for the acceptances.

That it was definitely agreed that only drafts having a maturity, and the proceeds of which would be received in San Francisco not later than one day in advance of the maturity of the acceptances, would be eligible or received for deposit under the acceptance agreements, and that none of the Birla drafts, having a maturity of 180 days, nor other drafts, unless meeting the requirement just specified, would be eligible for, or received as drafts, under any acceptance agreement, but on the contrary that these latter drafts should be deposited with the bank solely for the purpose of collection, is conclusively established by the evidence.

The determination of what securities were placed under the acceptance agreements cannot be ascertained from the agreements themselves. In neither agreement is any mention made of any draft or document

which by its terms is assumed to be the subject matter of the agreement. If the appellant had rested its case upon the agreements themselves without attempting to show by parol evidence the security to which their provisions applied, of necessity the court's determination would have to be adverse to appellant. The agreements were conspicuous by unfilled blanks. What securities were to be considered as being deposited under the acceptance agreements were, therefore, dependent entirely upon the understanding and intention of the parties as reflected by their negotiations and by conferences and conversations occurring between them at the inception of the transactions, as well as what was subsequently done by them. Although the agreements themselves do not disclose the identity or description of such securities, their respective provisions are entitled to consideration in connection with the oral evidence introduced for the purpose of enabling the court to determine whether, regardless of the maturity of the drafts, it was or was not the understanding of the parties that all drafts deposited should be deemed to be under and to be security for the acceptance agreements as well as the acceptances issued thereon.

Insofar as it is material to the question now under discussion, the terms of the agreement confirm and corroborate the claim advanced by appellee. It will be remembered that four groups of acceptances were executed and released by appellant, viz.,

Oct. 8, 1930	$115,000.00
Oct. 15, 1930	5,000.00
Oct. 21, 1930	10,000.00
Nov. 28, 1930	25,000.00

Each of the acceptances issued, by its terms, matured ninety days thereafter. It should likewise be noted that no acceptance was extended or renewed, and that no attempt ever was made to extend the maturity dates of the acceptances.

As these securities were not described or specified in the agreement, recourse was had to parol evidence from which it was clearly shown that certain drafts only were deposited under the agreement as security for the acceptances to be issued. To this security the bank necessarily looked to meet the acceptances upon maturity, and inasmuch as the moneys to meet the acceptances had to be on deposit in the bank a day in advance of the maturity thereof, the drafts upon which these moneys would have to be realized would necessarily have had to be payable and in the possession of the bank in advance of the maturity of the acceptances. (R. 261.)

Recourse to the evidence, however, shows that only the so-called short term drafts were understood and deemed to be under the acceptances, and that the proceeds of the drafts here involved represent moneys received by appellant upon drafts left with it solely for collection.

A. The character of drafts to be utilized as security under the acceptance agreement was specified and agreed upon.

As already indicated, the acceptance agreement itself is significantly silent with respect to the character, identity or description of the securities upon

which its provisions were to be fastened, or upon which the acceptances were to be based. To ascertain to what securities these agreements apply, consideration must be given to the oral testimony addressed to this subject. Upon this testimony, construed in the light of the surrounding circumstances and the subsequent conduct of the parties rested the trial court's determination with respect to the property which the parties understood should act as such security. In giving consideration to this evidence, the court should keep in mind that the sole purpose of the security was to assure appellant that the acceptances were secured, and that funds derived from such securities would be at its disposal in ample time to permit the acceptances to be liquidated when due. With the purpose thus sought to be accomplished by the parties before us, it must be obvious that drafts having a maturity longer than the maturity date of the acceptances would not be deemed available as securities out of which the acceptances would be paid when due, and that, therefore, a distinction should and would naturally be made between short term drafts and those coming within the category just mentioned.

The evidence upon this subject, however, clearly establishes that such distinction was in fact made, and that only the short term drafts were intended to be utilized as such security, while drafts not maturing until a date subsequent to the maturity date of the acceptances were deemed and understood to be deposited for collection alone.

With respect to this subject matter, Mr. Hall, in detailing the conversation had between himself and

Mr. Gilstrap upon his August visit to the bank, testified:

> "I discussed the situation of Birla Bros., its prominence and its financial standing. I believe I discussed whether the entire drafts on Birla would be available for acceptance purposes. He stated, as I remember it, that undoubtedly the sight drafts would be available, but he doubted that the 180-day drafts would be, on account of the length of time it took the draft to get over to India—about thirty days and then thirty days or so for the proceeds to return to the bank." (R. 344.)

Concerning this conversation, on cross-examination he testified:

> "I believe I discussed with him on that occasion what drafts would be deposited by Richfield under the acceptance arrangement. The substance of that conversation was that following out the use of short term acceptances—90 days—that all drafts would have to come so that they would mature prior to the maturing of the acceptances and be equal to or a little in excess of the acceptances." (R. 358-9.)

Between Hall's August visit and the visit of Hall and Pope on October 6, 1930, Gilstrap apparently had gone "deeper" into the matter and had probably conferred with some of his associate officials. This situation is made manifest from what occurred on October 6, where, with respect to the character of drafts to be utilized for security, Gilstrap had become definite and certain.

As to the conversation then occurring, Mr. Hall testified:

> "We had a general discussion in regard to the use of acceptances, as to maturity of the drafts on customers. In the conversation it was stated that ninety-day acceptances were the best to be used on account of the ready sale of the same. We discussed that all foreign drafts must be arranged so that the proceeds of the same would be in Wells Fargo's hands prior to the maturity of the acceptances." (R. 345-6.)
>
> * * * * * * *
>
> "We then discussed the shipment which was going forward to Birla Bros. and the 180-day drafts which were on that account. Mr. Gilstrap stated that those drafts would not be acceptable for two reasons: the length of time and also that he had received a credit report which they did not believe was sufficiently good to allow them to take it." (R. 346.)

This testimony was reiterated by him on cross-examination, where he said:

> "Mr. Gilstrap said the credit report showed that Birla Bros. was not financially strong enough and that the credit report was not good enough. He stated that on account of the length of time of the drafts and also on account of the report which he had received, they could not touch the 180-day drafts.
>
> "Mr. Leuenberger came into the conference and I asked him whether he could handle the 180 day drafts and he said he could not. He made some remark about the credit report, saying it did not look good. * * * I am under the impres-

sion that something was stated by Mr. Gilstrap that the drafts going under the acceptance forms would be distinctly set aside and placed in a line or marked as being under the acceptance agreement." (R. 361.)

The understanding testified to by Mr. Hall is likewise shown by the testimony of Mr. Pope, who came to San Francisco for the specific purpose of familiarizing himself with the arrangements made, as well as with the procedure to be pursued based upon such arrangements. (R. 260-1.) Speaking with respect to the conversations upon the subject of what drafts should be deposited for collection and what as security, he testified:

"Mr. Gilstrap told me that *the release of acceptances would have to be based on drafts the maturity date of which would be such that the funds would arrive in San Francisco before the maturity date of the bank acceptances.*" (R. 261.)

* * * * * * *

"Mr. Hall explained to Mr. Gilstrap the type of drafts in general that we took covering foreign shipments. The discussion was more or less based upon the general character of the drafts customary to each country." (R. 261.)

He then specifically referred to Birla Bros. Ltd. and after mentioning the volume of goods purchased from time to time by it, as well as its prompt payment therefor, the following occurred:

"We explained to Mr. Gilstrap our method of drawing on Birla Bros. We told him we drew on each shipment one-half of the total shipment

at sight and the other one-half at 180 days. The question came up as to whether we might base acceptances on both sets of drafts. He told us he would be glad to consider the sight draft, *but because of the length of time and because of the credit standing he could not consider the 180-day drafts on Birla Bros.*

We argued with him that we had never had any trouble with Birla Bros.—that they had always been very prompt pay and we urged him to let us use the 180-day drafts as the basis of bank acceptances, *but he refused.*" (R. 262.)

"I asked him as a matter of information whether it would be possible to utilize the 180-day Birla Bros. drafts as a basis for bank acceptances after a sufficient period had elapsed so that the proceeds might arrive in San Francisco within the 90-day period of prime commercial paper. He told me that it was a possibility only, and not to be seriously considered." (R. 263.)

And that the 180-day paper would only be taken for collection is also shown by this witness, who testified:

"Mr. Gilstrap told us that he would be glad to take the 180-day paper *for collection.*" (R. 263.)

As to the amount of drafts to be placed under the acceptance agreements, he further testified:

"He told us that we could not use the 180-day paper to base bank acceptances. He told us that it would be necessary to put up a sufficient amount of drafts in money to cover the bank acceptances. It would only be necessary to have enough from the proceeds of the drafts to cover the bank acceptances to be paid." (R. 263.)

This subject was again touched upon on cross-examination, where the witness testified:

> "To the best of my knowledge there was also an agreement that the 180 day drafts would be accepted *for collection only* and *not be used as a basis for the issuance of acceptances. The Richfield Oil Company was only required to deposit sufficient drafts, the net proceeds of which would satisfy the amount of the bank acceptances.*" (R. 314.)

He testified that the 180-day drafts were to be kept separate; that they were for collection only. (R. 316.)

And still further:

> "As I remember the discussion, Mr. Hall and I were trying to raise all the money that we could on the Birla Bros. respective shipments, and we asked Mr. Gilstrap if he could not issue acceptances against the whole shipment, and he said that he could not because the time of the 180-day draft was too long to be used as a basis for bank acceptances; that it would not be considered as prime paper. I believe he did at that time bring up the credit standing of Birla Bros. * * * The 180-day drafts, as I understood it, were definitely out, because they were too long." (R. 318-19.)

> "I believe that Mr. Gilstrap and Mr. Leuenberger said: 'We can not use as a basis for the amount of your acceptances the 180-day paper on Birla Bros.'" (R. 319.)

Without quoting further from the testimony of Mr. Pope upon this subject, we direct the court's attention to the evidence given by him upon redirect examina-

tion in connection with the various schedules contained in plaintiff's exhibit 117, where he not only specifically mentions the conversations occurring between him and Mr. Gilstrap, but likewise gives his understanding of the agreement entered into between the Richfield Company and the defendant bank on October 6, 1931. (R. 326-336.) To this schedule reference will hereafter be made.

In view of the fact that appellant's witnesses stressed the point during their testimony that appellant lacked faith in the financial stability of this company, it is rather difficult to conceive that it would have been willing to issue acceptances based exclusively upon the unsecured obligation of Birla Bros. plus the unsecured obligation of Richfield Oil Company.

Another most persuasive reason why the Birla Bros. 180-day drafts would not be considered as security for the acceptances is that in bank parlance these drafts when accepted constituted nothing more or less than "clean paper" representing an open indebtedness, unsecured in any manner. (R. 420.)

The existence of the agreement is further emphasized by the course of conduct and procedure pursued by Pope in connection with the deposit of the drafts. We have before noted that four groups of acceptances were issued. Before any of these acceptances were released, a sufficient number of *short term* drafts was deposited to take care of the acceptances. Upon this subject Pope testified:

> "Before release of acceptances was requested by the bank, Richfield Oil Company had on de-

> posit with the bank a sufficient number of *short time* drafts exceeding to some extent the total amount of the acceptances." (R. 307.)

From time to time Pope was required to ascertain from his records the drafts deposited as security for the acceptances and those on deposit for collection. In doing this he said:

> "The way I differentiated between drafts that were deposited under the acceptance agreement and drafts that were not deposited under the acceptance agreement was as follows: when I figured up my drafts at the time I requested the issuance of bank acceptances, I would have to have at that time enough drafts deposited at Wells Fargo Bank, the proceeds of which would pay promptly the bank acceptances." (R. 315.)

Later we will show that aside from the drafts upon which the acceptances totaling $25,000 were released, specific drafts were deposited for all acceptances previously issued. Pope, whose duty it was to keep a record of, and watch those drafts, from time to time made a report to Hall of the status of the drafts. And as the occasion required, Hall familiarized himself with the records thus kept by Pope.

For two months prior to his appointment as receiver, Mr. McDuffie was president of Richfield Oil Company. During this period, as well as while acting as receiver, he became informed in a general way of the agreement with the bank and the situation of the drafts. In the defendant's telegram of January 16, 1931 (Plff's. Ex. 3) it reserved its so-called banker's lien upon *"certain"* drafts. According to

McDuffie, the *"certain"* drafts referred to were the drafts which were under the acceptance agreement. As to his understanding of the drafts, McDuffie testified:

> "My understanding of the telegram was that they were reserving rights against certain specified drafts. It was my understanding that they were reserving their rights on the drafts of rather short life, the Birla Bros. drafts." (R. 225.)

> "I did not have the faintest idea the bank would reserve any right against anything except the acceptances; otherwise I should have taken the collections out of their hands long before that." (R. 226.)

> "When the answer of the Wells Fargo Bank came back, I understood that they were reserving a perfectly natural right to collect against those acceptances and that they were reserving their rights as against such drafts as might have been earmarked. I understood that specified drafts had been earmarked. I was advised of this by the accounting department of the Richfield Oil Company." (R. 229.)

And as indicating definitely that his understanding was that the long time drafts were not under the acceptances, he further testified:

> "I only knew generally that these four drafts, the major portion of them, were in the Wells Fargo Bank for collection." (R. 229.)

He further said that his reason for believing that he could withdraw the collections was:

"because my understanding was that *certain* drafts were there for collection only and were not under that agreement." (R. 231.)

And as indicating why he had made no specific inquiry prior to May, 1931, as to whether the collections could be withdrawn, he said:

"I doubt very much whether I made inquiry earlier than May of 1931 as to my right to withdraw the drafts because there was never the slightest doubt in my mind that there was any possibility that drafts for collection could be offset, drafts that were not under an agreement—the ordinary drafts." (R. 231.)

The information respecting the drafts came to McDuffie from various sources, his statement being:

"The information upon which I based my statement that I never had any idea that the bank could exercise any lien upon these drafts came from various sources. I cannot say exactly. I can only say that I had, myself, become firmly impressed with the idea that first of all there was no possibility of the bank asserting any lien against any drafts for collection, and also that the bank had not in its telegram reserved any lien of any character on ordinary collections." (R. 231-2.)

That there was no doubt existing in the mind of McDuffie at the time the bank notified him of its attempted seizure of the proceeds of the Birla Bros. drafts is further shown by McDuffie's testimony in which he said:

"At that time I understood and believed that the Birla Bros. drafts were on deposit with the

bank merely for the purpose of collection. I did not understand or believe that the Wells Fargo Bank was claiming the right to hold any of those drafts as security under any acceptance agreement. I did not at that time understand or at any time prior thereto understand or believe that any of those drafts that we tried to stop payment on had been deposited with the bank under either any acceptance agreement or for the security of acceptances issued or released by the bank." (R. 233-4.)

* * * * * * *

"I understood that the short term drafts were being held under the acceptance agreement and that the long term drafts were being held solely for the purpose of collection." (R. 234.)

"I understood that it (appellant's wire of January 16, 1931, Plff's. Exhibit No. 3) referred to such drafts as they were holding as security. I did not understand at that time that this telegram related to any drafts not held by the bank as security and understood by me to be held by the bank merely for the purposes of collection. In May 1931 when for the first time I attempted to revoke the authority of the bank to make these collections, it was my understanding that the bank merely held these drafts for collection." (R. 235.)

Whatever doubt might be entertained as to McDuffie's understanding was dispelled upon his recross-examination by appellant's counsel during the course of which the following occurred:

"My understanding is that the Wells Fargo Bank had at the time of my appointment as re-

ceiver *certain drafts for collection and certain drafts subject to an acceptance agreement as security for certain acceptances. It is not my understanding that they were certain drafts that were deposited and the whole thing was collateral for certain acceptances that were held by the bank.* My understanding was that the bank held certain drafts as collateral for certain acceptances pursuant to an acceptance agreement and that it held other drafts for collection." (R. 236.)

B. The drafts deposited for the release of acceptances totaling $130,000 were specifically identified and earmarked.

While the oral testimony introduced on behalf of appellee is itself convincing, the proposition that but certain of the drafts were deposited as security for the acceptances, and the remainder were deposited solely for the purpose of collection is demonstrated by appellant's correspondence. This correspondence not only identifies and earmarks the particular drafts deposited for the first group of acceptances totaling $130,000, issued and released by appellant, but likewise further identifies the particular drafts, the proceeds of which were in fact utilized in payment of the acceptances. This same correspondence also clearly indicates the character of drafts which were deemed by the parties to be eligible for use under the acceptances, and by its failure to refer to the so-called long term drafts definitely establishes that the parties never contemplated or understood that such drafts would be given consideration in the issuance of acceptances.

The persuasive force of this correspondence was readily recognized by appellant, as it must have been by the lower court. The futility of appellant's effort to combat or minimize the effect of this correspondence must be apparent. The communications in which specific drafts are mentioned are all referred to in schedule B. (Plff's. Ex. 117.) The "identifying" letters referred to were preceded by Mr. Lyons' letter of Oct. 13, 1930 (Plff's. Ex. 28) in which, among other things, it is said:

> "Our records show that we have with your good bank a draft reserve of $9,734.16 against which no acceptances have been issued."

Appellant's reply (written by Mr. Gilstrap) dated Oct. 15, 1930 (Plff's. Ex. 29), discloses how this reserve is computed, and it is there stated:

> "You mention that you have a draft reserve with us of $9,734.16. This figure covers the amount of your drafts Nos. 103009 and 103012 and the balance remaining on your Nos. 103006A and 103004, but evidently does not take into consideration your draft No. 103010, drawn on La Paz, Bolivia for $11,031.14."

In the response of Lyons to this last communication (Plff's. Ex. 30) it is clear that the Richfield Company is of the same understanding as was Gilstrap, because it is there stated:

> "In talking with Mr. Gilstrap Saturday, he informed us that we might use our collection No. 103010, your No. 46843 on La Paz, Bolivia, as reserve against acceptances. Under these circumstances, would you please issue an acceptance for $10,000 to mature in 90 days."

That the additional acceptance for $10,000 was issued upon the security of the La Paz draft is evidenced by the letter of Mr. Leuenberger, dated October 21, 1930 (Plff's. Ex. 31) in which he states:

> "We have *earmarked* same against your collection No. 46843 on La Paz, Bolivia."

It cannot be successfully argued that the earmarking of this draft was due to some inadvertence or misunderstanding on the part of Mr. Leuenberger, for the reason that plaintiff's exhibit 30 discloses that the suggestion that the $10,000 acceptance should be issued against that particular draft emanated from Mr. Gilstrap in his letter of October 15, 1930 (Plff's. Ex. 29) and was discussed by him during his trip to Los Angeles, shortly after the inception of these transactions. Furthermore, Gilstrap himself became familiar with the Leuenberger letter (Plff's. Ex. 31) because upon his return to San Francisco a letter was written by him to the Richfield Company (Plff's. Ex. 32) enclosing a copy of the bank's letter dated October 21, 1930 (Plff's. Ex. 31) which apparently had been lost in the mail.

It will be observed that no reference whatever was made to drafts 103005 and 103006B, being the two 180-day drafts of Birla Bros., Ltd., obviously because of the understanding that they were deposited only for collection, and because of their far distant maturity dates, they were not security for the issued acceptances. In this connection it might also be remarked that in none of the correspondence passing between the parties until May 8, 1931, when the drafts were

seized by the bank, was it asserted, intimated or suggested that any of the long term drafts were deemed to be under the acceptances. The absence of such suggestion is peculiarly significant.

After the issuance of the $10,000 acceptance on October 21, 1930, a number of drafts were deposited by the Richfield Company with appellant. By November 24, 1930 a sufficient number of short time drafts coming within the purview of the agreement had been deposited by the Richfield Company to enable it to obtain the release of additional acceptances totaling $25,000. Thereupon and not until then did the Richfield Company request the issuance of such acceptances. Its request is evidenced by its letter dated November 24, 1930 (Plff's. Ex. 33), in which, among other things, it states:

> "Will you be kind enough to issue these acceptances as of November 28. *This will give a reasonable allowance for delay in the remittance of draft payments.*"

The sentence in italics manifestly intended to convey the information that if the acceptances would not mature until ninety days after November 28, 1930, no question could arise but that the proceeds of the short term drafts then in the possession of the bank under the acceptance agreement would be available in satisfaction of the acceptances.

In addition to the correspondence just referred to, the letters from the bank, in which are mentioned the collection of drafts and the application of their proceeds in anticipation of the maturity of the accep-

tances, confirmed the agreement as contended for by appellee. Detailed references to this correspondence, including the drafts to which it refers, the gross and net proceeds of the drafts and to what acceptances the net proceeds were applied is shown in Schedule "D" (Plff's. Ex. 117) to which reference is made without further elaboration.

The mere circumstance that the proceeds of certain drafts deposited under the acceptance agreement were collected and deposited to the credit of the Richfield Company or its receiver is of no importance in this controversy. From time to time after the acceptances had been issued, drafts were deposited with appellant for collection. It became obvious to appellant that no necessity would exist to retain the proceeds of all drafts under the acceptance agreement, and that if there was a minor deficiency, when the payment date of any of the acceptances arrived, such deficiency would readily be made up by the Richfield Company or taken from the proceeds of drafts not under the agreement. The action taken by appellant in this regard, as well as the exact situation existing at the time of the crediting of such proceeds either to the company or to the receiver is disclosed by the schedules contained in plaintiff's exhibit 117, the contents of which are fully explained by the testimony of Mr. Pope. (R. 326-36.)

C. Appellant's conduct prior to May 8, 1931, is consistent with appellee's claim and inconsistent with the contention of appellant.

As before remarked, where a dispute arises with respect to an agreement entered into between the parties or its terms, the manner in which the parties acted under such agreement, as well as their conduct is sometimes conclusive evidence of the character of the agreement as well as the understanding of its terms by the parties. In the instant case it was established without contradiction that prior to the date of appellee's appointment as receiver of the Richfield Company, without any request emanating from the company, the bank collected certain of the drafts and credited the proceeds thereof to the account of the Richfield Company. This same course of procedure was pursued with respect to certain other drafts maturing and collected between February 26 and May 8, 1931.

D. The conduct of the officials and employees of the Richfield Company establishes the agreement as asserted by appellee.

The conduct of the officials and employees of Richfield with respect to the understanding had between the latter company and the bank is equally potent as establishing their understanding of the agreement, as well as the character of the agreement entered into. Whatever explanation may be made with respect to the conduct of appellant, as illustrated by its correspondence, by its actions and by its procedure, no dispute of any kind exists in the record respecting

the understanding of the Richfield Company and its officers and employees. The records kept by them, the correspondence emanating from them, the manner in which the collections were handled by them, and the circumstances under which releases of acceptances were requested, all prove that it was its and their understanding that only short time drafts, payable under the circumstances described should be deemed or treated to be under the acceptance agreement.

No agreement was made providing for any continuing credit under the acceptance agreement.

Realizing the futility of seriously contending that it was ever understood that all foreign collections, regardless of amount, should be deemed deposited under the acceptance agreement dated October 4, 1930, but more particularly that Birla Bros. 180-day drafts should likewise be deemed to have been deposited as security for acceptances, upon the trial of this action for the first time appellant claimed that *notwithstanding the provisions contained in the acceptance agreement,* it had been agreed that a continuing or revolving credit should be given Richfield Company not to exceed at any one time $150,000. In accord with this claim it was further contended that whenever any issued acceptances had been paid additional acceptances to the amount thus liquidated could and would be issued provided, of course, there was ample credit on deposit to insure payment of such acceptances.

Considering the wants and necessities of the Richfield Company and the number and amount of drafts

deposited for collection, it is indeed surprising that, if any such agreement existed, no additional acceptances were requested by the Richfield Company. This is peculiarly significant when it is remembered that the first group of acceptances totaling $115,000 was paid in full on January 6, 1931; that a sum sufficient to liquidate these acceptances had been deposited to the credit of the acceptance fund long before such date, and that between January 6, 1931, and the date of the appointment of the receiver, the Richfield Company was in dire financial straits. For these reasons alone the claim thus advanced by appellant is incredible of belief.

But that the claim thus made is entirely destitute of merit and lacks any tangible basis is proven by reference to the answer filed by appellant herein, in which it is asserted:

> "With respect to the agreement under which said drafts were deposited, defendant avers *that the only agreement* between said Wells Fargo Bank & Union Trust Co. and said Richfield Oil Company of California, a corporation, with respect to the deposit of said drafts and the collection and disposition of the proceeds thereof was as set forth in two certain written agreements each designated 'acceptance agreement' duly executed by said Richfield Oil Company of California, a corporation, and addressed to Wells Fargo Bank & Union Trust Co., prior to the receipt or acceptance of said drafts, said acceptance agreement being dated respectively October 4th and November 28, 1930 * * * That true copies of said acceptance agreements, being the sole contracts between the Richfield Oil Company

> of California, a corporation, and said Wells Fargo Bank & Union Trust Company with respect to the deposit of said drafts and the collection thereof and the disposition of the proceeds thereof are hereto attached, expressly made a part hereof, said acceptance agreement dated October 4, 1930, being designated and marked Exhibit 'A' and said acceptance agreement dated November 28, 1930 being designated and marked Exhibit 'B'." (R. 104-5.)

These averments in substance are repeated from time to time in subsequent portions of appellant's answer. Nowhere in its answer is it asserted or suggested that any agreement existed between Richfield Company and appellant with respect to said drafts other than and excepting said two acceptance agreements.

The two agreements referred to are identical in form. Their language is plain, definite and free from ambiguity. Their examination will disclose that nowhere is it provided that there shall be any "continuing or revolving credit" or any credit excepting the original $150,000 in the one agreement and $5000 in the other. In fact, however, as has already been stated, each agreement assumes the contemporaneous deposit of the securities to which the provisions relate. That each of the agreements is barren of any suggestion relating to a continuous or revolving credit is not only apparent from its reading, but was testified to by Gilstrap, who said:

> "There is nothing in the acceptance agreement wherein anything is said about a continuous guaranty or revolving fund." (R. 402.)

Preliminarily it may be stated that inasmuch as the provisions of these agreements, because of their clarity, cannot be varied or contradicted by parol, the claim of a continuous or revolving credit cannot be given consideration.

But even assuming, for the purposes of argument, that this defense is within the issues raised by the pleadings and can be established by parol, a consideration of the evidence found in the record disproves the verity of any such contention.

A. The conversations and the negotiations between the parties negative the claim.

It will be remembered that upon cross-examination Gilstrap definitely testified that no conversation occurred between him and Hall upon this subject during the August visit, and that the only time it was touched upon was upon the October 6th visit of Hall and Pope and that it was not discussed on Hall's visit of October 8, 1930. (R. 411.) It will be noted that the conversation occurring on October 6th was AFTER Pope had delivered to him the written agreement and the accompanying contemplated acceptances. (R. 371.)

Assuming that continuous credit was mentioned, or even discussed, aside from the positive denials of Hall and Pope respecting any such agreement, to which reference will hereafter be briefly made, it must be apparent that no such agreement could have been or was made. The written acceptance agreement had not only been executed by the executive officers of the Richfield Company having authority to make

such agreement, but it had actually been delivered before any of these conversations occurred, and the record is entirely lacking in evidence indicating that either Hall or Pope was authorized to modify any of its provisions. But, in any event, it is clear that Hall never made any agreement with appellant respecting continuous credit. (R. 365.)

Later we will point out that aside from the conversations, the conduct of each of the parties negatived any such understanding.

Pope, who appellant admits was brought up for the express purpose of familiarizing himself with the mechanics as well as the details of the contemplated transactions, was positive that there was no such agreement. Upon this subject he testified:

> "I do not remember any discussion with the Wells Fargo Bank & Union Trust Co. about a revolving credit or a continuous credit. I do not remember Mr. Hall telling me that the bank had granted a credit to Richfield Oil Company of $150,000.00 on banker's acceptances and that this was to be a continuing credit or a revolving credit to be covered by one agreement. This was not my understanding of the transaction. I had no discussion with Mr. Hall about it. * * * It is my understanding that if we had issued the initial $150,000.00 of bank acceptances which we brought up it would be necessary to make out a new acceptance agreement." (R. 313.)

The fact that Pope was informed that it was impossible to fill in the blanks contained in the agreement because from time to time they would be de-

positing drafts under the agreement all of which could not then be identified, has no bearing whatever upon the question of continuous credit. It was intended to issue acceptances to the extent of $150,000. It was also intended to deposit specified drafts as security for such acceptances. Inasmuch as the drafts to secure the acceptances for $150,000 were not available under the agreement when it was delivered, obviously the drafts could not be identified in the agreement. Such suggestion, however, does not disclose that any continuous credit was intended or actually agreed to, or was in the minds of the parties. The non-existence of any such agreement is conclusively proven by evidence aside from the conversations of the parties.

Emil Leuenberger, one of appellant's witnesses, did not participate in any conversations with Pope or Hall while in the bank respecting a continuous credit, but testified on direct examination that while at lunch with Pope he explained to him the mechanics of the acceptances and "about" the revolving nature thereof. (R. 430.) His conversation, if it occurred, was merely explanatory and it is not claimed rose to the dignity of an agreement. In this connection, however, it will be remembered that this was the witness who wrote the so-called "ear mark" letter earmarking the La Paz draft of $11,031.14, against the $10,000 acceptance. This communication is not only inconsistent with the so-called revolving fund theory, but likewise discredits the claim that all drafts were under the agreement.

An examination of the testimony given by Hellman, as well as Lipman, cannot be contorted into any agreement for continuous credit. Mere references to a line of credit could not establish the agreement claimed. Furthermore, these latter conversations occurred with Hall in August before the acceptance agreement was executed and, inasmuch as it related to a subject-matter covered by the provisions of the written agreement, merged in that agreement.

B. Correspondence of the parties.

On November 24, 1930, the Richfield Company requested the issuance of acceptances amounting to $25,000. At that time acceptances aggregating $130,000 had already been issued under the acceptance agreement, leaving $20,000 still available. To cover the additional $5000 requested, a further acceptance for that sum was transmitted to appellant. (Plff's. Ex. 33.) On November 28th the acceptances for $25,000 were issued by appellant and the net proceeds credited to the account of the Richfield Company. (Plff's. Ex. 35.) On December 1, 1930, appellant, through its assistant cashier, C. B. Clemo, wrote Richfield Company as follows:

> "As your Acceptance Agreement covering the execution of acceptances by us against your documentary export bills calls for $150,000, we are enclosing another agreement for $5000 to cover the acceptance for this amount executed by us November 28, in accordance with your letter of November 24.
>
> Please sign and return this form to us." (Plff's. Ex. 37.)

It will be observed that by this letter appellant definitely informed the Richfield Company that the acceptance agreement called for but $150,000 and that the execution of another agreement covering the additional acceptance for $5000 was essential. While it is true that under the continuous guarantee theory, such agreement would be proper for the reason that the maximum limit of credit under the original agreement had been reached, the point of the matter is that appellant's letter (Plff's. Ex. 37) fails to mention *continuous credit* and likewise fails to inform the Richfield Company that additional acceptances can only be obtained under the original agreement when some or all of the issued acceptances have been liquidated.

The non-existence of any continuous or revolving credit is further shown by the correspondence between the parties relating to the payment of the acceptances aggregating $25,000. It will be remembered that this group of acceptances matured on February 26th. Shortly prior thereto appellant had collected upon drafts deposited with it in anticipation of the above payment, $23,500.30, leaving a balance to be collected of $1499.70.

On February 21st appellee sent to appellant, attention W. J. Gilstrap, the following communication (Plff's. Ex. 105):

> "Enclosed you will find a Bank Acceptance for $1600 payable at 40 days sight, and an Acceptance Agreement, properly executed.
>
> We are forwarding these documents to you in order to make good the balance due of $1499.70

on the $25,000 of Bank Acceptances coming due the 26th. *If, however, in the meantime, you receive sufficient funds from draft payments to take care of this deficit, please return* these papers to us.

Thank you for your courtesy in this matter."

On the date upon which this letter was written all of the acceptances, excepting $25,000 had been liquidated in full and a sufficient sum was on deposit with appellant to meet the $25,000 acceptances, excepting $1499.70. It, of course, will be conceded that the appointment of the receiver terminated the right to any further credit under the acceptance agreement, but it is obvious that the officials of Richfield were not aware of this situation. *They therefore forwarded to the bank an acceptance accompanied by an acceptance agreement.* The response of appellant written and signed by Gilstrap upon this subject (Plff's. Ex. 107) is illuminating. Before this letter was written, the deficit had been collected. After writing the receiver, to that effect, the letter concludes:

> "We are returning herewith the acceptance form and the acceptance agreement which you forwarded with your letter of February 21 and which we shall not have to use." (Plff's. Ex. 107.)

It will thus be seen that in the only correspondence passing between the parties in which additional credit or acceptance agreements were referred to, nothing was mentioned indicating that any arrangement had been made for a continuing or revolving credit.

The general correspondence between the parties, however, is likewise important in connection with the proposition under discussion. Between October 6, 1930, when the acceptance agreement was delivered, and May 8, 1931, when the funds of appellee were seized, a mass of correspondence passed between the parties, most of which emanated from the very officers and employees familiar with the transactions here involved. Although much of this correspondence related to the deposit of drafts and the collection and disposition of their proceeds, not a single word was ever written by either party suggesting or intimating that any continuous credit had been agreed upon. Furthermore, nowhere in all of this correspondence is there an intimation that further credit was available to the Richfield Company under the original acceptance agreement, although on December 16, 1930, sufficient monies were on deposit with appellant to meet the $115,000 acceptances, and on January 6, 1931, they were paid in full.

C. Conduct of Richfield Company negatives continuous guarantee.

The first group of acceptances aggregating $115,000 matured and became payable January 6, 1931. On December 16, 1930, appellant had collected $119,850 which sum was deposited in anticipation of the acceptances to become due. On December 16, 1930, Richfield Company was advised in writing by appellant that this sum had been applied "in anticipation of maturing acceptances." (Plff's. Ex. 93.) With this sum in the bank's possession, it becomes apparent that if a continuous credit had been arranged, even though

the first group of acceptances had not been paid, Richfield could have readily obtained the release of additional acceptances to the extent of $115,000 at any time between December 16th and January 6th. But however this may be, the Richfield Company was in *dire distress* on January 6, 1931, and remained in such condition until after the appointment of the receiver. Yet, although upon appellant's theory at least as early as January 6, 1931, the Richfield Company could have obtained from the bank $115,000 upon additional acceptances, no application for such sum or any part thereof was made. This circumstance is not only persuasive but controlling that no agreement had been entered into for any continuous credit.

D. Payment of collections to Richfield negatives continuous credit.

Between the issuance of the original group of acceptances aggregating $115,000 and the appointment of the receiver, the proceeds of six drafts deposited with appellant were collected and the net amount thereof from time to time credited to the account of *Richfield Company.* (Schedule G; Plff's. Ex. 117.) These sums were thus credited without any request having been made therefor by any of the officials of Richfield Company.

These payments are inconsistent with the idea that an agreement existed for continuous credit. Had there ever been such an agreement or mutual understanding, before making these payments, it is fair to say that by every ordinary rule of the business world some correspondence would have been indulged in

between the parties in which mention would have been made of such an agreement.

We are, therefore, justified in concluding that this "continuous or revolving credit" theory was imported into this case for the purpose of creating an apparent foundation upon which to support appellant's claim that all—instead of "certain"—of the drafts were deposited under the acceptance agreements. It realizes that in the absence of such foundation its claim in this regard would be without color or substance. It must be clear, therefore, that no justification whatever exists for the claim that any continuous or revolving credit was accorded the Richfield Company.

Appellant bank waived its right of banker's lien and setoff as against all collections of Richfield Oil Company then in its possession excepting those specifically deposited under the acceptance agreements.

For some months prior to January 15, 1931, Richfield Oil Company was enmeshed in financial difficulties. It owed various banks a sum in excess of $10,000,000, no part of which was secured. (R. 205.) It was indebted in a large sum to a number of merchandise creditors, some of whom were pressing it for payment. It was only with much difficulty that it was able to meet payrolls, freight charges and current indebtedness due public utilities which could not be delayed. Litigation was threatened which, if commenced and prosecuted to final judgment, would result in sacrifice of the properties of the Richfield Company, prevent it from carrying on its business and

in all probability force it into bankruptcy. This distressing situation not only became known to most, if not all, of the creditors of the Richfield Company, but was made the subject of many conferences and much discussion, particularly among its bank creditors including appellant, to all of which it became obvious that unless such threatened litigation was prevented and the business of the Richfield Company permitted to go forward the indebtedness due to them, at least in major part, would become uncollectible. To avoid this result a receivership was determined upon and on January 15, 1931, in appropriate litigation instituted for that purpose, appellee was appointed receiver of Richfield Company. On the same day, in an ancillary proceeding instituted in this district, appellee was appointed ancillary receiver to take charge of the property here located. (R. 205-8.)

Each of the orders above mentioned appointed appellee receiver "of all the *property, assets and business* owned by or under the control or in the possession of Richfield Oil Company." (R. 90.) By the terms of each order the receiver was authorized "forthwith to take and have complete and exclusive control, possession and custody of *all of the property and assets* owned by or under the control of or in possession of the Richfield Company, real, personal and mixed, of every kind, character and description." (R. 92.) And the receiver was "authorized until the further order of the court to *continue, manage and operate the business of the defendant with full power and authority to carry on, manage and operate the business and properties of the defendant * * * to the*

end that the operation of the business of the defendant should not be interfered with or interrupted." (R. 93-4.)

While neither appellant, nor any of the other bank creditors of Richfield Company, was a party of record to the receivership proceedings, it is disclosed by the evidence without contradiction that they were instituted and the receiver appointed, if not as the result of their active cooperation, at least with their consent. It is quite apparent, therefore, that one, if not the principal purpose sought to be achieved by the receivership *was to enable the business of the Richfield Oil Company to be carried on in the expectation that as a result of such procedure the indebtedness, or a considerable part of it, due to its creditors would ultimately be liquidated.*

Immediately after his appointment and qualification the receiver transmitted to the various banks with which the Richfield Company had been doing business and in each of which it maintained a commercial account, a copy of the order appointing him receiver, whereupon some of the creditor banks, in the exercise of their right of setoff, applied the cash balances then standing to the credit of the Richfield Company, in partial payment of such indebtedness. (R. 203-6.) Learning of such action and realizing that unless there was made available to him all *cash balances* and *all other credits belonging to Richfield in the possession of said banks,* it would be impossible for him to carry on its business, a meeting was called by the receiver to which representatives of all creditor banks were invited. This meeting was held on the morning

of January 16, 1931, and was attended by representatives of all creditor banks excepting appellant and First Seattle Dexter Horton Bank. (R. 205.) During the course of this meeting the receiver explained to those present its purpose and, according to his testimony, among other things, said:

> "I told the bankers at this meeting that the conditions were such that if they felt it was necessary to seize these balances, I, as receiver, could not carry on, and that the receivership must be immediately terminated and it would be necessary to go immediately into bankruptcy. **I told them that it was not only necessary that I have the balances restored but that I have their assurance that the normal flow of business would be allowed to go on. Collections were coming in of course. That if they merely restored my balances it would be obvious that it would be impossible to carry on the business if collections were seized. I asked them if they would not restore to me all funds that might be available.** I particularly brought that to their attention that after all the receivership was created to protect the estate and to carry it on, and that without funds it was utterly impossible to carry on the estate." (R. 206-7.)

> "I explained as thoroughly as I possibly could that it must be obvious to them that such a business as Richfield's was dependent upon the receiver having available all possible funds, that is, **all assets of every character,** so that the receiver might endeavor to continue the business in some operating form, and that without funds it was utterly impossible. Payroll checks had to be met and public utility charges had to be met

> once a month. Freight had to be met as it was incurred. A very large amount of the business of Richfield Oil Company was being done on credit." (R. 223.)

Edward J. Nolan, an executive of the Bank of America, the largest bank creditor of Richfield, was present at this meeting. According to his testimony:

> "Mr. McDuffie informed the assembled bankers that some of the banks had offset the balances as of the date of the receivership and stated to us that if the company were not to go into bankruptcy it would be necessary for him, as receiver, to have the necessary cash to meet public utility charges, railroad freight rates and labor charges, and that if the balances that had been offset were not restored or if the other banks would not consent not to offset the balances it would be necessary for the company to file a petition in bankruptcy or ultimately bankruptcy would result. He said all the **credits and all the funds and all the assets, especially the current assets,** that belonged to the company, must be turned over to him, otherwise he could not carry on the affairs of the company." (R. 241.)

That drafts deposited with the bank for collection, as well as the collections themselves, were *credits* and *assets* of Richfield Oil Company to which, as well as to the cash balances, the receiver was referring, is likewise shown by Mr. Nolan, his testimony upon this subject being:

> "I understand balances in a bank would be such items that are deposited for credit and collected, or if there is an agreement with the de-

positor that one may draw on uncollected items, we sometimes consider that as a balance. **I would regard foreign drafts deposited with a bank for collection as credits, and when the drafts are collected and the money comes into the possession of the bank I would regard that as cash balances.**" (R. 245-46.)

Upon cross-examination he testified:

"*Foreign drafts can be considered as credits.*" (R. 246.)

And on redirect examination:

"If a draft is deposited in a bank by a depositor or a merchant for collection, I would regard that as one of his credits. In the absence of any agreement to the contrary, if a foreign draft is deposited with a bank for collection and the bank collects the amount due upon the draft, I would regard that as a credit. When collection is made and the money comes into the possession of the bank it is a balance due the customer." (R. 247-8.)

It must be manifest from this evidence that while the receiver at this time was directly concerned with the restoration of the cash balances offset, and while he was insistent that other banks should agree not to offset cash balances, he required that all bank creditors should agree that **all assets and credits** in their possession belonging to the Richfield Company should be made available to him, or he would retire from the receivership, and the company would go into bankruptcy. That such was the understanding

of the bank creditors, including the appellant, was conclusively proved.

At the time of this meeting, while at least some of the banks had checks and credits in transit, the only banks which had foreign drafts in their possession were Security-First National Bank of Los Angeles and appellant. (R. 216.) These facts were known by the receiver and also by Mr. Hardacre, the representative of the Security Bank. It was agreed by the bankers present, as to some of them, however, subject to ratification by their respective banks, that if those banks which had offset the cash balances would restore such balances, and if all banks would agree to make available to the receiver all *credits* in their possession, none of the other banks would exercise their right of banker's lien or right of offset against any of the funds or credits of the Richfield Company. (R. 242.) Accordingly, at the conclusion of the meeting, a telegram was prepared by some of the bankers present, in cooperation with the receiver, to be sent to each of the banks for the purpose of carrying into effect the purpose sought to be accomplished by the meeting. In this connection it will be noted that among those participating in the preparation of the telegram was Mr. Ralph B. Hardacre, an official and representative of the Security-First National Bank, which had in its possession foreign drafts not yet collected. (R. 209-242.) This circumstance is of considerable importance for the reason that his understanding of the telegram (Plff's. Ex. 2), as well as the responses thereto, including the response of appellant (Plff's. Ex. 3) is shown by the action of the Security Bank making available

to the receiver not only its cash balances, *but all collections subsequently made by it upon these foreign drafts.* The telegram thus prepared and transmitted to the various banks including appellant is Plff's. Ex. 2 and reads as follows:

> "As receiver I am ordered by federal court to take *over all assets including cash* in banks Stop While you have undoubted right of offset such right if exercised would seriously cripple receivers operations It is necessary therefore to request that all banks restore to receiver full cash balances Stop Please therefore transfer such funds to a new account on your books in my name as receiver Evidence of my authority and signature cards will follow by mail Stop Local banks have indicated *they will acquiesce in this program.*" (R. 209.)

A mere reading of this telegram will disclose that the program referred to was the taking over by the receiver of *all assets including cash in banks.* The right of offset referred to is a right of offset as against "all assets including cash in banks." The program in which "local banks have indicated they will acquiesce" is the turning over to the receiver of all *assets including cash in banks.* It, therefore, clearly indicated to appellant that the agreement to be entered into was to turn over to the receiver *"all assets* of the Richfield Company including cash in its possession," and that as to such *assets* and cash its right of offset should be waived. But in order to prevent appellant, which had not participated in the meeting from misconstruing the telegram and to apprise it of what had occurred at such meeting, and what the re-

ceiver was insisting upon in order to prevent his retirement and bankruptcy on the part of Richfield, Mr. Nolan was requested by the receiver to communicate personally with appellant. Mr. Hardacre was likewise requested to perform a similar service with respect to the Dexter-Horton Bank at Seattle. (R. 242.) In this connection it will again be remembered that Mr. Hardacre, to whom was assigned this latter duty, was the representative of the Security Bank which subsequently turned over its collections to the receiver. Pursuant to such request, Mr. Nolan immediately telephoned to Mr. Eisenbach, one of the chief executives of appellant, stating that the purpose of the call was to

> "acquaint them with what took place at the bankers' meeting that day." (R. 242.)

As to what occurred between him and Mr. Eisenbach, Mr. Nolan testified:

> "During the course of my conversation with Mr. Eisenbach I stated to him *the substance of what had occurred at the meeting of the bankers.* I recall explaining to Mr. Eisenbach that unless all of the banks were unanimous in returning the balances that it looked to me as though the company would have to go into bankruptcy; that Mr. McDuffie had stated to us that he had to have certain funds to take care of public utility charges, labor charges and freight charges." (R. 243.)

Upon cross-examination he testified that the telegram was the work of about twelve of them (R. 245) and

"It was intended to be the agreement with the bankers *with some amplification,* and I think that is why Mr. McDuffie suggested that we get in touch with Mr. Arnold of Dexter-Horton and Mr. Eisenbach of Wells Fargo. The amplification was not that something was desired besides the telegram itself, but to explain to banks not present the dire condition of the company and the importance and necessity of returning the balances at once, or else the company would be forced to go into bankruptcy." (R. 245.)

Upon redirect examination he further testified:

"As stated in cross-examination, the primary reason for telephoning Mr. Eisenbach was to elaborate upon the wire that was prepared by the bankers in cooperation with Mr. McDuffie and to explain the dire condition of the receivership; that if the balances were not restored or if the bankers' liens were to be exercised by the different banks that it would be necessary for the company to go into bankruptcy. * * * *I told Mr. Eisenbach that it would be necessary that the receiver have all the funds of the Richfield Oil Company for the purpose of continuing the business and to avoid bankruptcy.* Mr. McDuffie went to great length in explaining to all of us that obligations from day to day arose in the Richfield Oil Company that had to be liquidated in some way. I tried to pass that on to Mr. Eisenbach, *I tried to pass on to Mr. Eisenbach just what took place at the meeting that morning."* (R. 246.)

Comment is made by the appellant upon the fact that it had no representative present at the meeting between the banker creditors and McDuffie and there-

fore it could not be charged with knowledge of the occurring discussions. This evidence was not offered or admitted for that purpose. It was introduced for the limited purpose of showing the foundation of the agreement and likewise to disclose that the consideration for the waiver on the part of appellant was, among other things, the agreement on the part of the other creditor banks (aside from the Security Bank) to restore balances already offset, and, as to the Security Bank, to restore the cash balances already offset and turn over to the receiver the foreign collections then in its possession as and when they were received, without exercising thereon its banker's lien and right of setoff. (R. 240.)

Nor has appellant appreciated either the purpose sought to be accomplished by the conversation shortly thereafter held between Nolan and Eisenbach or the information conveyed to the latter by Nolan.

If the receiver had merely been interested in the cash balances, or if Hardacre, of the Security Bank, had not been interested in learning that the foreign collections in the possession of the appellant bank would be made available to the receiver, no reason would have existed for the conversation between Nolan and Eisenbach. In this connection it will be remembered that the only two banks in which foreign collections had been deposited were the Security Bank and the appellant bank, and that the purpose of the conversation, as explained by Nolan, was

> "to acquaint them (executives of appellant bank) with what took place at the bankers' meeting that day." (R. 242.)

The testimony of Mr. Nolan is unopposed. It is true that Mr. Eisenbach testified that he had no recollection of the conversation, but he also added that he would not testify that it did not occur. (R. 452.) Mr. Eisenbach's failure of recollection is peculiarly significant with respect to this all-important conversation. That it actually occurred cannot be seriously denied. Why he failed to recall it is, in our judgment, inexplicable, particularly when we consider that he testified that he dictated a memorandum of all important conversations or conferences. (R. 454-5.)

After receipt of Plff's. Ex. 2 *and after the conversation between Nolan and Eisenbach had occurred,* appellant prepared and sent to the receiver its response. (Plff's. Ex. 3.) It is again significant that this telegram was prepared and signed by Mr. Eisenbach with whom Nolan had shortly theretofore conversed. This telegram reads as follows:

> "Replying telegram we are willing to restore in your name as receiver original balances in checking account provided we are notified by you that all company banks have taken similar action Stop We are holding *certain* collections as security for acceptances Please understand that we *continue* to reserve all our rights for bankers lien *against these collections.*" (R. 210.) (Italics ours.)

How, under the proven circumstances, appellant can expect to successfully claim that this telegram reserved to it its banker's lien on all foreign drafts then in its possession, we are unable to appreciate. At the time of its preparation, appellant had before

it the order appointing receiver containing the language above quoted (R. 203); it knew that the receiver, in order to carry on the business of the Richfield Company which was the purpose of his appointment, had to have available to him *all credits* and *funds* of the Richfield Company; it had before it the receiver's wire prefaced with the statement that

> "I am ordered by federal court to take *over all assets including cash in banks*"

and it had in mind the information given that very morning by Mr. McDuffie to the banks, as well as the discussions occurring at that meeting, the substance of which had been conveyed to it by Nolan. Furthermore, it had in its possession *certain* foreign drafts, described in bank parlance as *"collections,"* as security for the acceptances previously executed by it and then outstanding. Clearly the "banker's lien" to which it was referring as against these collections was whatever lien it possessed upon them as security for the acceptances. While it may be argued that the words "banker's lien" did not aptly describe the exact lien which the bank had upon such drafts, the information intended thereby to be communicated to the receiver undoubtedly was that it had issued certain acceptances, that it had in its possession certain collections as security therefor, and that as to THOSE collections it was reserving its lien as security for such acceptances. As we will hereafter point out, the technical meaning of a particular word falls as against the understanding and intention of the parties and the purpose sought to be achieved. Furthermore, the

court will note the use of the word *"certain"* which clearly indicated that only some of the collections theretofore deposited with appellant were under the acceptance agreements.

It is not at all reasonable that with the information which was conveyed to Mr. Eisenbach by Nolan, coupled with the information respecting the financial condition of the Richfield Company, which was possessed by appellant bank, it wrote the telegram (Plff's. Ex. 3) in which, among other things, it said:

> "We are holding *certain* collections as security for acceptances. Please understand that we continue to reserve all our rights to banker's lien against *these* collections."

Undoubtedly the officials of appellant by whom that telegram was prepared believed that the receiver had mentioned to the representatives of the bank creditors that collections had been deposited with it and that it in turn had issued acceptances secured by *certain* of these collections, which acceptances would shortly mature and would have to be liquidated in full. Undoubtedly appellant having, as Mr. Eisenbach testified, and as appellant admits, kept in close touch with the financial affairs of Richfield (R. 455) knew that certain foreign collections were or might still be in the possession of the Security Bank. Appellant desired McDuffie, as well as the other creditor banks, to know that these outstanding acceptances would have to be paid and, so that there might be no misunderstanding upon this subject, it added to its telegram the language above quoted. Indeed no other explana-

tion can logically be made. If the understanding of appellant was that the receiver was interested only in having restored the offset bank *balances* no necessity existed to add the trailer above quoted to its telegram, for the language:

> "Replying telegram we are willing to restore in your name as receiver Richfield's balances in checking account provided we are notified by you that all company's banks have taken similar action"

would have been wholly adequate. Furthermore, the language used in the concluding part of its telegram, upon which reliance is here made, would otherwise have been meaningless.

Not only was it the understanding of the appellant that by its telegram it merely reserved its lien upon those foreign collections deposited under the acceptance agreements, but undoubtedly such was the understanding of the receiver and of the bank creditors to whom the wire was read. Upon this subject, too, there is no dispute in the record. Mr. McDuffie, on cross-examination testified:

> "My understanding of the telegram was that they were reserving rights against *certain specified drafts.* It was my understanding that they were reserving their rights on *drafts of rather short life,* the Birla Bros. drafts. I do not know the exact drafts when I used the words 'certain drafts.' I did not know in detail what drafts were referred to. * * * I did not have the faintest idea the bank would reserve any rights against anything except the acceptances; otherwise I should

have taken the collections out of their hands long before that." (R. 225-6.)

"The agreement between the banks as I understood it was that our funds of all character would be available to the receiver." (R. 226.)

"When the answer of the Wells Fargo Bank came back I understood that they were reserving a perfectly natural right to collect against those acceptances *and that they were reserving their rights as against such drafts as might have been earmarked.* I understood that specified drafts had been earmarked. I was advised of this by the accounting department of the Richfield Oil Company." (R. 229.)

"I recall testifying this morning that if I had thought there was at any time in the minds of the Wells Fargo Bank the thought that they could take drafts that were deposited there for collection and offset them, or that they were reserving rights against any drafts that were there for collection, that I certainly would have endeavored to take them out. I did not know that that was impossible because my understanding was that *certain drafts were there for collection only and were not under that agreement.* I understood that it could be done. I doubt very much whether I made inquiry earlier than May of 1931 as to my right to withdraw the drafts because there was never the slightest doubt in my mind that there was any possibility that drafts for collection could be offset—*drafts that were not under an agreement*—the ordinary drafts." (R. 231.)

"The information upon which I based my statement that I never had any idea that the bank could exercise any lien upon these drafts came

> from various sources. I cannot say exactly. I can only say that I had, myself, become firmly impressed with the idea that first of all there was no possibility of the bank asserting any lien against any drafts for collection and also that the bank had not in its telegram reserved any lien of any character on ordinary collections. * * * It became firmly imprinted in my mind and it was an extraordinary experience to me when the bank exercised it later because I thought there was no possibility of its being done." (R. 231-2.)

Still later he testified:

> "With respect to that part of Plaintiff's Exhibit No. 3 which is the response made by the bank to my wire of January 16th, reading as follows: 'We are holding certain collections as security for acceptances. Please understand that we continue to reserve all our rights for banker's lien against these collections,' I understood that it referred to *such drafts as they were holding as security.* I did not understand at that time that this telegram related to any drafts not held by the bank as security and understood by me to be held by the bank merely for purposes of collection." (R. 235.)

That the banks likewise so understood the telegram is shown not only by the protests voiced by them when appellant summarily seized the proceeds of the drafts here involved, but likewise by the action of the Security Bank in thereafter turning over to the receiver the proceeds of drafts in its possession at the time of his appointment. With respect to such protests, Mr. McDuffie testified:

> "I have heard some of those bankers voice their protests against the action taken by the Wells Fargo Bank in attempting to exercise the banker's lien or right of set-off against collection of those particular drafts. Every banker with whom I discussed it protested. Some of them voiced such protests not only in my hearing and presence, but likewise in the hearing and presence of Mr. Ward Sullivan and Mr. Roche." (R. 233.)

That the Security Bank credited the receiver with the collections from drafts in its possession at the time of his appointment is also shown by Mr. McDuffie, his testimony being:

> "I know that the Security-First National Bank had drafts for collection and that the collections as made were credited to the account of the receiver." (R. 235.)

This subject-matter was also testified to by Mr. Pope, his testimony being:

> (The Schedule) "refers to five drafts deposited by Richfield Oil Company before receivership aggregating $152,524.03. This sum was collected by Security-First National Bank after the appointment of the receiver and after the receipt of the telegram of January 16, 1931 by the bank and after all of the other banks had sent in their telegrams, which proceeds were paid over to the receiver by Security-First National Bank. These drafts had been deposited by the Richfield Oil Company with that bank for collection only." (R. 335.)

Appellant seems to derive some comfort from the circumstance that in the replies sent to the receiver's

telegram by the various banks to which the telegram was sent, reference is made only to the cash balances. (App's. Br. 11.) However, it is only necessary to remind the court that in none of these banks excepting the Security Bank had any collections been deposited, nor were there any assets or securities belonging to the Richfield Company in the possession of these banks other than and excepting cash balances. Obviously, the reply of each of these related exclusively to such cash balances because they constituted the only assets or credits of the Richfield Company in their possession. The Security Bank was located in Los Angeles. Its representatives were constantly in touch with the Richfield Company and, after the appointment of the receiver, Mr. Hardacre, its principal representative, was present at and participated in the meeting of January 16, 1931, and likewise assisted in framing the telegram which was transmitted by the receiver to the various banks.

Mr. Hardacre's understanding of the response sent by appellant to the receiver (Plff's. Ex. 3) is demonstrated by the action of his bank in not only restoring cash balances in excess of $40,000 (Plff's. Ex. 9), *but in thereafter crediting to receiver's account collections aggregating $152,524.03,* upon all of which, in the absence of the agreement contended for, it had the right to exercise its right of banker's lien and setoff.

The letters immediately thereafter passing between receiver and the banks relating to the cash balances are of no significance because at that particular time they were dealing with nothing but the cash balances

that had either been restored or upon which the right of setoff was agreed not to be exercised.

As has already been pointed out, the understanding of the creditor banks of the agreement existing between them is convincingly established by their attitude upon learning of the seizure of the Richfield funds by appellant bank. Upon this subject Mr. McDuffie testified:

> "I told them, and I know that I told them, as it was an important item, and I considered that I had a distinct duty toward them and therefore I advised them explicitly in the matter; I considered that not only had the Wells Fargo Bank broken faith as far as the receiver was concerned, but it had broken faith with those banks, and I told them I would pursue to the utmost my endeavor to get that money returned, because I did not think that in any sense of the word Wells Fargo had any right to do it. I explained the situation as best I could, how it all came about. **Everyone of them protested. Not only that they felt there was no right in it, but that they themselves never would have restored their balances had they thought Wells Fargo was reserving in its mind this character of right.**" (R. 237.)

(a) The practical contemporaneous construction by the parties to the agreement evidenced by the telegram of January 16, 1931, should be a guide to the court in its interpretation.

Where the meaning of an instrument is in doubt, or where its terms are to some extent ambiguous, or where it is susceptible of two or more interpretations,

and where the parties are not in accord with respect to its meaning, the contemporaneous construction of all of the parties as evidenced by their conduct and actions with respect to the subject matter of the agreement is admissible for the purpose of establishing what was in fact their understanding and intention. As we will quickly point out, until May 8, 1931, judged by the conduct of the parties, no discord existed between them respecting the meaning of appellant's telegram of January 16, 1931. (Plff's. Ex. 3.) The contention that such practical contemporaneous construction is an appropriate guide to the action of the court in construing such telegram and in determining the understanding and intention of the parties is supported by numerous authorities. Among the many, we cite:

Keith v. Electric Engineering Co., 136 Cal. 178-181;

Mayberry v. Alhambra Co., 125 Cal. 444-6;

Rosenbaum v. Robert Dollar Co., 31 Cal. App. 576;

Hill v. McKay, 94 Cal. 5-20;

Stein v. Archibald, 151 Cal. 220;

Rockwell v. Light, 6 Cal. App. 563-5.

This proposition deals *first,* with the conduct of appellant; *secondly,* with the conduct of the receiver of Richfield Oil Company; and *thirdly,* with the conduct of the bank creditors other than appellant.

(b) Appellant itself construed its telegram of January 16, 1931, as reserving a lien only upon the drafts under the acceptances.

The receiver was appointed on January 15, 1931. On February 26, 1931, the last group of acceptances, totaling $25,000, was paid in full. By February 14, 1931, in anticipation of these acceptances, appellant had applied the net proceeds of certain drafts collected by it totaling $23,500.30. The difference between this sum and $25,000 was $1499.70. This sum appellee endeavored to make up by the issuance of a draft for acceptance by appellant and the transmission to it of a new acceptance agreement, both of which were subsequently returned to appellee unused. (R. 302-304.) Between February 14 and February 26 the appellant collected four drafts, the net proceeds of which aggregated $9249.28. From this sum on February 26, 1931, it deducted $1499.70 which, with the funds previously collected, paid the acceptances in full. Appellant then had remaining in its possession $7749.58, the proceeds of these foreign collections. With respect to this sum, by letter dated February 26, 1931 (Plff's. Ex. 107) appellant advised appellee:

> "The remainder of the proceeds totaling $7,749.58 we are holding in accordance with notice given you by our wire of January 16th."

Thereafter and on March 2, 1931, appellee, understanding as he did that by the wire referred to, appellant had reserved its lien upon *"certain"* drafts being the drafts under the acceptance agreement, and being unable to appreciate upon what theory appel-

lant claimed the right to hold such proceeds, wired appellant (Plff's. Ex. 109) requesting it to repeat to him its telegram of January 16. On the same day by telegram, appellant repeated its wire of January 16. (Plff's. Ex. 110.) Upon receipt of this wire, appellee undoubtedly compared it with appellant's original telegram of January 16 (Plff's. Ex. 3), and realizing that there was no difference in the wires and being convinced that appellant had no right to retain the proceeds of these drafts under its reservation contained in its wire of January 16, on March 3 wrote appellant the following letter (Plff's. Ex. 108):

> "Referring to your letter of February 26th, advising us of payment of certain drafts totaling $9260.81, less certain charges amounting to $11.53, leaving a balance of $9249.28 from which you are taking $1499.70 to meet the balance due on acceptances February 26th, leaving the sum of $7749.58 to be credited to our account, and referring to your telegram of January 16th, I beg to inform you that all banks transferred the total amount of deposit to the credit of Richfield Oil Company of California on January 15th, 1931, to the credit of William C. McDuffie, Receiver. I will therefore appreciate it if you will kindly credit the remainder of the proceeds so mentioned above $7749.58 to the credit of Richfield Oil Company of California, William C. McDuffie, Receiver, and advise us as soon as this transfer has been made." (Plff's. Ex. 106.)

Thereupon and on March 5, 1931, *without any other communication passing between appellee and appellant,* appellant credited the receiver's account with

$7749.58 and wrote to appellee the following communication:

"March 5, 1931.

We refer to your letter of March 3 regarding funds received representing proceeds of collections.

In accordance with your request, we are crediting the account of William C. McDuffie, Receiver, Richfield Oil Company of California, with the sum of $7749.58.

We are also crediting this account with $11,082.51, representing proceeds of collection No. 13,106 of the Richfield Oil Company of California, particulars as per memorandum attached.

Yours very truly,"

It must be obvious to the court that upon the language of the wire of January 16, 1931, being called to the attention of the appellant and its consideration of the circumstances under which it was prepared and the purpose sought to be achieved by the receiver as well as all bank creditors of Richfield Company in negotiating the agreement, that it realized that the receiver was entitled to the funds, and that it had no claim against them.

Furthermore, in the letter last quoted, reference is made to the collection of the proceeds of draft No. 13,106 for $11,107.50, the net proceeds of which amounted to $11,082.51. A reference to Schedule C (Plff's. Ex. 117) will disclose that this draft was deposited with appellant on January 9, 1931. It will also be noted that nowhere in Plff's. Ex. 106 is any reference whatever made either to this draft or to its

proceeds, and yet of its own initiative and in the absence of any request from appellee, appellant credited the receiver's account with the net proceeds of this draft.

Between February 26, 1931 and May 8, 1931, in addition to the four drafts first above mentioned and in addition to the net proceeds of draft No. 13,106, amounting to $11,082.51, the bank collected the proceeds of nine drafts, the net proceeds of which amounted to $15,381.62, and deposited each of these collections to the account of the receiver. The number, gross amount, net proceeds, date of deposit with appellant and date of payment of each draft are shown on Schedule H. (Plff's. Ex. 117.)

With respect to these collections the evidence shows without dispute that the net proceeds of each of these drafts was likewise credited to the account of the receiver *without any affirmative act or request upon his part or on the part of any of the officials of Richfield Company,* but solely upon the uninfluenced initiative of appellant. The total sum thus credited to the account of the receiver by appellant, representing the net proceeds of drafts deposited before his appointment, but collected thereafter, including the above mentioned sum of $7749.58, amounts to $34,213.71. (Schedule I, Plff's. Ex. 117.)

In connection with the subject matter under discussion, it will be noted by the court that every collection made by appellant between February 26, 1931, when the acceptances were paid in full, and May 8, 1931, was thus credited to the account of the receiver,

and that no banker's lien or right of setoff was attempted to be exercised as to any draft or its proceeds. It should also be noted that whenever a draft was collected, and its net proceeds credited to the receiver's account, a written advice of such action was transmitted by appellant to the receiver. In no instance during this period did appellant by letter, wire or word of mouth, assert, intimate or suggest to the receiver or any official or employee of the Richfield Company that it was reserving or claiming to reserve or had the right to exercise any banker's lien or right of setoff as to these drafts or their proceeds. It will further be noted that during this entire period of time, appellant had in its possession all of the drafts, the proceeds of which are here involved, including the three 180-day sight drafts on Birla Bros., and that at no time, by letter, wire or word of mouth did it assert, suggest or intimate that it was holding any of these drafts as security for the debt due to it from Richfield Company, or that it intended to subject any of these drafts to its alleged banker's lien, or that it contemplated or intended to offset the proceeds, or any of them, when collected, to such indebtedness.

In its discussion of the effect of the crediting of the draft proceeds to the receiver, appellant states:

> "Appellee further claims that appellant's conduct after the transmission of its telegram of January 16th has evidentiary force adverse to appellant on the question of waiver of lien. Appellee's contention in this respect is that the subsequent relinquishment by appellant to the receiver of some of the draft proceeds is evidence confirming

> the interpretation which appellee places on appellant's telegram of January 16." (App. Br. 134.)

It is undoubtedly true that such action did confirm "appellee's interpretation" of appellant's telegram, but it also demonstrates that the appellant bank did in fact agree to the waiver as claimed, because the crediting of these proceeds of the drafts to the receiver was and is convincing evidence that appellant had no claim upon the collections. It established such waiver by proving that its subsequent transactions were in harmony only with the existence of the waiver and inconsistent with appellant's present claim. Furthermore, it was evidence showing that appellant construed and understood its telegram (Plff's. Ex. 3) as a waiver of all collections which were not under the acceptance agreements.

Appellant would have this court assume that the collections made by it between January 16, 1931, and May 8, 1931, constituted moneys voluntarily restored by it to the receiver in the absence of any legal obligation requiring such credits. Aside from the other obvious infirmities of this claim it is out of harmony with the action subsequently taken by appellant. Regardless of what appellant asserts to the contrary, the financial condition of the Richfield Company was no different in May than it was in February. In fact, considering the character of tax which had to be paid in February, its financial distress was then more acute. The non-payment when due of property taxes only results in a lien upon the real property and not its immediate sale. Failing to pay the gasoline tax,

however, would bring about a forfeiture of the right of Richfield to further continue the sale and distribution of gasoline which was its principal business, the result of which would have been bankruptcy.

The statement of Eisenbach that the Richfield Company was in danger of bankruptcy in May was destroyed under his cross-examination and was clearly refuted by the evidence of Mr. McDuffie who was obviously more familiar with the receivership and its affairs than Mr. Eisenbach. Upon cross-examination the former said:

> "During the first year that I was receiver there was never a time when the Richfield Oil Company was not in dire need of cash, and it was necessary for me during that time to get in my possession as quickly as possible all available funds." (R. 235-6.)

Furthermore, the very fact that even though deprived of the funds that are here involved, which were so necessary to the business activity of the receiver, bankruptcy proceedings failed to result, is a complete negation of the unsupported claim of Eisenbach that in May, 1931, bankruptcy proceedings were believed to be imminent.

Appellant would have the court believe that in crediting appellee's account with the sum of $7749.58 on March 5, 1931, and the additional sum of $11,082.51 it was merely cooperating with the receiver and gratuitously bestowing upon him the aggregate of the two sums just mentioned. We are unable to appreciate the argument thus made nor do we understand how it can seriously assert that in

crediting these funds it merely "acceded to the request of the receiver." Until the receipt of appellant's letter of February 26, 1931 (Plff's. Ex. 107) appellee had not been advised that the collections referred to therein had been made. After stating that the outstanding acceptances had been paid in full, the letter proceeds:

> "The remainder of the proceeds totaling $7749.58 we are holding in accord with the notice given you by our wire of Jan. 16."

The natural import of this language was that they were retaining the sum of $7749.58 under a *claim of right* given recognition in its wire of January 16th.

If the receiver had understood Plff's. Ex. 3 as contended for by appellant bank, and he desired it to cooperate with him to the extent of permitting him to utilize these funds, *although having no right thereto,* he would have immediately written appellant bank to that effect. But the receiver engaged in no such conduct. He re-read the telegram (Plff's. Ex. 3) for the purpose of ascertaining whether he was mistaken in the construction previously placed upon it by him and finding nothing inconsistent with his understanding he assumed that the original contained some language omitted from the copy delivered to him. Accordingly he wired appellant bank to repeat its telegram of January 16th. Upon reading the repeated wire and realizing that he had not misunderstood the original (Plff's. Ex. 3) he wrote to appellant bank as already shown. (Supra p. 78.) This letter cannot be construed as a mere "request" for cooperation or a request that moneys to which the receiver was not

legally entitled should be gratuitously bestowed upon him. It was a plain, unvarnished and unambiguous statement that because the other banks had carried out their part of the agreement the receiver, *as a matter of right,* was entitled to the $7749.58. It was a declaration that by the language of Plff's. Ex. 3 the understanding of the receiver was that appellant had no claim of any kind to any of the collections not deposited under the acceptance agreements. According to the testimony of appellant, this letter was read not only by Gilstrap, to whose attention it was directed, but by the executives of the bank. They had either before them or in mind all of the telegrams passing between the parties, including Plff's. Exs. 2 and 3, and were advised that the request or demand of the receiver for the return to him of the $7749.58 was based upon *a legal right to such funds.* He did not go to appellant in the attitude of a supplicant begging for financial assistance to which he was rightfully entitled. He requested the return to him of the withheld funds upon the asserted claim that he was legally entitled thereto.

And did the appellant bank, when thus called upon to challenge the claim advanced by the receiver, if made without justification, advise him of any misunderstanding? Most assuredly not! It not only turned over to him without protest the $7749.58, but in addition thereto credited his account with $11,082.51 concerning which there had been neither correspondence nor communication. If any basis whatever exists for the appellant's contention that the $7749.58 was credited to appellee because of his request, it is

inconceivable why appellant should voluntarily turn over to the receiver the *additional* sum of $11,082.51 as to which no request had been made, and concerning the collection of which the receiver then lacked knowledge, excepting that the receiver was legally entitled to such funds.

Notwithstanding the persuasive character of the evidence just referred to, that Plff's. Ex. 3 should be interpreted as claimed by appellee is also conclusively established by the proof of claim of appellant filed in the receivership proceeding on March 28, 1931, before this controversy arose, by F. A. Raymond, one of appellant's principal officials. In the claim he is characterized as "vice president and cashier".

After describing the indebtedness due from Richfield Oil Company to appellant, which at that time amounted to $636,189.95, it is stated:

> "*that there are no offsets or counterclaims to said debt;* no notes or other evidences of indebtedness have been taken or received except those of which copies are hereto attached; no judgment has been rendered for such indebtedness or any part thereof; and no claim to preference in payment from the receivership estate is made; **that no securities are held by said claimant for said indebtedness.**" (R. 366-7.)

On the same date appellant filed in the receivership proceeding another proof of claim arising out of an indebtedness due appellant for services rendered as registrar. This claim was verified by A. J. Callahan its "assistant trust officer". In this latter proof

of claim, after stating the basis of the indebtedness, it is stated:

> *"that there are no offsets or counterclaims to said debt* * * * no claim to preference in payment from the receivership estate is made except as to a check for $846.50 and **that no securities are held by claimant for said indebtedness."** (R. 367-8.)

It is true that on or about May 19, 1931, ten days after appellant seized the funds herein involved and some days after the protest against such seizure had been made by appellee, an amended proof of claim was prepared and sought to be filed by appellant. (R. 464-5.) This amended claim, however, is lacking in evidentiary value, considering the time when and the circumstances under which it was attempted to be filed. No amended claim, however, was ever proposed or filed as a substitute for the proof of claim verified by Callahan.

(c) Receiver construed Plff's. Ex. 3 as reserving a lien only upon the drafts under the acceptances.

We have already commented upon Mr. McDuffie's understanding of the telegram of January 16, 1931 (Plff's. Ex. 3), and have called to the attention of the court the testimony given by him addressed to this subject. (Supra, pp. 70-72.)

We have shown that from time to time the net proceeds of the drafts not applied in anticipation of payment of acceptances were credited to the account of the receiver in appellant bank and utilized by the receiver in accord with the order appointing him

receiver. That he assumed that these collections and credits were in accord with the understanding reached between himself and appellant and the remaining bank creditors is evidenced from the circumstance that such procedure caused no comment on his part. While it might be asserted that this latter evidence was more or less negative in character, his understanding and interpretation of the telegram is demonstrated by the action taken by him the very instant that appellant engaged in conduct antagonistic to such understanding. The incident here referred to arose out of the statement contained in appellant's letter of February 26, 1931 (Plff's. Ex. 107) in which it was stated that the latter was holding $7749.58 "in accordance with notice given you by our wire of January 16th." The receiver's insistence that these net proceeds should be forthwith credited to his account because of the contents of appellant's telegram of January 16, 1931 (Plff's. Ex. 3) which must be taken in connection with the previous wire of appellee likewise dated January 16, 1931 (Plff's. Ex. 2) and the surrounding circumstances already mentioned, establish beyond question that the receiver understood that by its telegram, appellant continued to reserve a lien only upon the drafts actually under the acceptances. As has already been shown this understanding was confirmed by the subsequent action of appellant which, without objection, credited to receiver's account all of said proceeds. (Plff's. Ex. 108.)

It further appears that just as quickly as the receiver learned, on May 8, 1932, that appellant was claiming the right to retain the proceeds of the drafts

in question under its alleged banker's lien or right of setoff, he not only personally protested, stating what his understanding of the agreement was, but immediately sent Hall to San Francisco to insist that the position taken by appellant be reversed. His demand for the payment to him of the proceeds being refused, this litigation resulted. It, therefore, appears without conflict that continuously since the receipt of appellant's wire of January 16, 1931 (Plff's. Ex. 3) the receiver understood that appellant was merely reserving a lien upon the drafts under the acceptances, and that at no time by correspondence, word of mouth, act or conduct has he indicated that his understanding was otherwise.

(d) The bank creditors of Richfield likewise interpreted appellant's telegram of January 16, 1931, in accordance with the interpretation placed upon it by Receiver.

It has already been pointed out that the bank creditors of Richfield Company, fully conversant with its affairs and financial status, were insistent upon and brought about the appointment of the receiver, such appointment being required and made for the purpose of enabling the company's business to be carried on, its properties protected from sacrifice and to avoid bankruptcy. In the preceding pages of this brief we have shown that immediately after his appointment, the receiver, in conference with representatives of all of said bank creditors other than appellant, insisted that all offset cash balances be restored, and that the credits and balances of the Richfield Company in the

possession of said banks, including appellant, be made available to him, otherwise he would retire from the receivership, the result of which would precipitate bankruptcy. We have also called to the attention of the court the telegram sent by the receiver to the banks, including appellant, and that by way of elaboration of said telegram, and in order that appellant would have full knowledge of the circumstances under which it was written, and the purposes intended to be accomplished by the receiver, the substance of what had occurred at the meeting between the receiver and the bank creditors was communicated to appellant, and thereafter appellant transmitted to the receiver its wire of January 16, 1931. (Plff's. Ex. 3.)

It seems to us to be unnecessary to be obliged to argue that the purpose sought to be accomplished by the bankers, including appellant, by the agreement entered into between them and the receiver was *to enable the business of Richfield to be carried on.* This was, and necessarily had to be the *"spirit"* if not the body of the agreement. That such was the primary and principal object of the receivership is evidenced by the recitations contained in the order appointing the receiver.

Shortly after its receipt, Plff's. Ex. 3 was read to some of the banker creditors (R. 227), among others, Mr. Hardacre, representative of Security Bank. That these banker creditors interpreted Plff's. Ex. 3 in accord with the interpretation placed upon it by the receiver is made manifest not only because of the object sought to be attained, viz.: the continuance

of the business of Richfield, but from their subsequent conduct. At the time of the receiver's appointment, the Security Bank had in its possession for collection foreign drafts aggregating $152,524.03. Not only did it waive its right of offset against the cash balances belonging to Richfield then in its possession, but in addition thereto, as the proceeds of these drafts were collected, they were forthwith credited to the account of the receiver. This action on the part of the Security Bank is more eloquent respecting the meaning of appellant's wire (Plff's. Ex. 3) than any testimony that could be given by its representative. Furthermore, when the bankers learned of the action taken by appellant on May 8, 1931, they vehemently protested, their protests being bottomed upon the ground that such action was a clear violation of the agreement entered into between them, the receiver and the appellant. (R. 237.)

Use of word "basis" misconstrued by appellant.

Although it is evident from the testimony of Hall and Pope, confirmed and amplified by the correspondence, conduct and actions of the parties, that the definite understanding was that only short-term drafts should be under the acceptances, appellant claims that because upon occasions the word "basis" was used by some of the parties, what the appellant meant was that the short-term drafts would be used as the basis of the amount of the acceptances to be issued and not as the sole security to be taken by the bank to insure payment of such acceptances. The meaning of the

word "basis" when used by a witness necessarily must depend upon the meaning intended to be given to it by the person testifying. To ascertain such meaning reference should be had to all of the witness's testimony upon the particular subject-matter in connection with which the word "basis" was sometimes used. An examination of the testimony of both Hall and Pope will establish beyond any possible doubt that the agreement entered into between appellant and Richfield was as claimed by appellee and not as asserted by appellant.

The point here made can be readily illustrated by an extract from the testimony of Pope wherein he testified:

> "Mr. Gilstrap told us that he would be glad to take the 180 day paper for collection. He told us that we could not use the 180 day paper (upon which) to base bank acceptances. He told us that it would be necessary to put up a sufficient amount of drafts in money to cover the bank acceptances. It would only be necessary to have enough from the proceeds of the drafts to cover the bank acceptances to be paid." (R. 263.)

And again:

> "To the best of my knowledge there was also an agreement that the 180 day drafts would be accepted for collection only and not be used as a basis for the issuance of acceptances. The Richfield Oil Company was only required to deposit sufficient drafts, the net proceeds of which would satisfy the amount of the bank acceptances." (R. 314.)

And further:

> "We asked Mr. Gilstrap if he could not issue acceptances against the whole shipment and he said that he could not because the time of the 180 day drafts was too long to be used as a *basis* for banker's acceptances * * * that the 180 day drafts, as I understood it, were definitely out because they were too long." (R. 319.)

Lyons' letter (Def. Ex. A) is lacking in evidentiary value.

Appellant apparently attaches great importance to the letter of Lyons dated October 7, 1930. (Def's. Ex. A.) When consideration is given to the circumstances surrounding the writing of this letter, as well as to the purpose sought to be accomplished by it, coupled with the fact that Lyons had no connection with and was lacking in detailed knowledge of the transaction evidenced by the acceptance agreement, the conclusion is inevitable that it is of no importance or legal significance. The transaction in question was negotiated exclusively by Hall and Pope. Lyons at no time participated therein. The acceptance agreement, together with the unaccepted drafts amounting to $150,000 were delivered by Hall and Pope to Gilstrap on October 6th. At this time the Richfield Company was in dire financial distress and it was essential that funds be obtained at the earliest possible moment. On the evening of October 6th Hall and Pope returned to Los Angeles. On the evening of the following day Hall left Los Angeles for San Francisco bringing with him among other things the four Birla Bros. drafts together with transmittal letters. Ordinarily the two

transmittal letters, with the drafts and documents referred to therein, would have been transmitted to appellant by mail. If such had been the procedure the Lyons letter would not have been written. Hall came to San Francisco not because it was necessary that the transmittal letters, drafts and documents should be delivered personally, but to enable him to obtain forthwith the $115,000 in order that it could be utilized in Los Angeles before the night of that day. (R. 347-8.) To permit such use, upon the net proceeds of the acceptances being credited to the account of Richfield the deposit slip was telephoted to Los Angeles. Lyons was interested in getting the $115,000 and getting it quickly, and the letter was written by him with this object alone in view. The details of this transaction had already been agreed upon. The letter did not undertake to restate such details or to modify or restrict them in any manner, nor did it undertake to change, modify or alter the agreement already made. It was the character and type of letter that anyone under like circumstances would have written, the writer never imagining that it would subsequently be characterized as illustrative of the agreement existing between the parties. We are unable to comprehend the basis for the claim that this communication should be taken as a substitute for the negotiations previously conducted by the parties as well as for the agreement entered into between them definitely fixing their rights and obligations. That the appellant itself attached no importance to the letter is further evidenced by the circumstance that its contents were never discussed by the officials of the bank with any of the representatives of the

Richfield Company. A conclusive reason why this communication is utterly lacking as an important element in this case is that while it refers to "shipment" the evidence of all of the witnesses, including Gilstrap, a portion of whose testimony is above quoted proves conclusively that the agreement related to drafts and to nothing else. But that the Lyons letter is not susceptible of the meaning imputed to it by appellant and that the understanding of Lyons was exactly in accord with that testified to by Hall and Pope, and that whatever understanding he had upon the subject was that only short-term drafts were being deposited as security under the acceptance, the balance being sent to the bank for collection alone is conclusively proven by the correspondence dictated by Pope but read and signed by Lyons, the first written within six days after the letter stressed by defendant (Deft's. Ex. A) and the second written less than two weeks thereafter.

The first letter written by Lyons to appellant after the transmission of Deft's. Ex. A was dated October 13, 1930, and was as follows:

> "Our records show that we have in your good bank a draft reserve for $9,734.16 against which no acceptances have been issued.
>
> If this information is correct please issue one of the drafts which you now hold for $5,000 payable in 90 days.
>
> Thanking you for your courtesy in this matter." (Plff's. Ex. 28.)

This letter demonstrates that Lyons' understanding was not only that drafts, but that certain specified

drafts, had been deposited as security for the payment of the acceptances issued. No other construction can be given to the letter. Its language is clear, definite, positive and certain. But if any doubt whatever could arise as to its meaning and as to the understanding of Lyons it will be quickly dispelled by reading the latter's letter of October 20th. This letter was written while Mr. Gilstrap was in Los Angeles and after he had conferred with the officials of Richfield. (R. 349.) Because of the absence of Mr. Gilstrap it is addressed to Mr. Luenberger. There it is said:

> "In talking with Mr. Gilstrap Saturday, he informed us that we might use our collection number 103010, your number 46843, on La Paz, Bolivia, as reserve against acceptances. Under these circumstances, would you please issue an acceptance for $10,000.00 to mature in 90 days. * * *
>
> Your courtesy in this matter is appreciated." (Plff's. Ex. 30.)

These two letters were dictated by Pope and signed by Lyons at a time immediately following the inception of the transactions involved when the parties had clearly in mind the details of the agreement made and long before any dispute or controversy arose either over the subject matter of the agreement or regarding what drafts were deposited under the acceptance agreement. In fact at this time the relations between the parties were extremely cordial and friendly.

With these two letters before us, regardless of all other testimony upon the subject, the argument constructed by appellant upon the Lyons' letter of October 7th disintegrates.

That Deft's. Ex. A is not susceptible to the interpretation given it by appellant is also shown by the witness Pope, who on cross-examination testified:

> "With reservations, I should say that plaintiff's Exhibits 22 and 23 are the letters of transmittal and the shipping documents referred to in the letter of October 7th, which has just been marked Defendant's Exhibit 'A', my reservations being that due to our understanding with Mr. Gilstrap and our conversation, the documents that we had to refer to with respect to the issuance of the $115,000.00 worth of bank acceptances were the sight drafts. * * * It was my understanding that the payment of $115,000.00 was to be made against drafts." (R. 317.)

Comparison of records kept by parties to the transaction.

Criticism is made by appellant of the records kept in the Richfield office respecting the foreign collections deposited with Wells Fargo Bank as not definitely showing what drafts were, and what were not under the acceptance agreement. No foundation whatever exists for such criticism. Pope kept in his office a detailed record of all drafts. (R. 249.) He also kept records showing what particular drafts, according to his understanding of the agreement were under the acceptances, consisting of little pencil memos. (R. 305.) He also used the correspondence with the bank for the purpose of indicating when the drafts were collected and the amount of their proceeds. (R. 305.) Why any additional records should have been kept by him is not explained. In its brief appellant states that

> "there was no evidence introduced as to where, or how or when these 'little pencil memorandums' were kept, nor were they produced at the trial." (Appellant's Br. p. 61.)

We cannot help but manifest some surprise at this latter statement. Appellant's counsel were not prevented from interrogating the witness respecting this subject matter and, unless appellant's counsel were apprehensive lest such cross-examination would have been prejudicial, the inquiry would have been pursued. Furthermore, the records were not demanded. If they had been, they would have been made available to counsel. The inference arising from the absence of any such demand is that appellant's counsel either assumed or knew that they would have been produced, and that their production would be fatal to appellant's claim.

ARGUMENT.

This subdivision of our brief will be confined to a statement of the propositions upon which appellee relies for an affirmance of the judgment of the court below, together with a citation of the statutory provisions and judicial precedents supporting his position.

ORDER OF PRESENTATION.

While in our sequential and chronological presentation of the facts we dealt with the agreement entered into between Richfield Company and appellant in which it was understood

> "that the collection of the foreign drafts by appellant should be entirely separate and apart from all financial obligations and transactions theretofore or thereafter to be conducted in the ordinary course of business between appellant and appellee" (Finding 7, R. 184),

in presenting this argument before touching said agreement we intend to address ourselves to the agreement of January 16, 1930 (Finding 19, R. 190-1), because in our judgment this court can quickly conclude that the finding of the lower court with respect to this latter agreement is not only sustained by the evidence, but the existence of the agreement demonstrated, and it will therefore become unnecessary to give consideration to the evidence establishing the prior agreement which occupies a very substantial portion of the record.

OPINION OF LOWER COURT.

At this point we believe it proper to state that in determining this controversy an opinion was filed by Hon. Frank H. Norcross, judge by whom this action was tried, in which the evidence which forms the basis of his conclusions is succinctly and clearly stated. This opinion is contained in the record (R. 156-180) and itself conclusively establishes not only that the court's findings are supported by the evidence but that upon a consideration of the whole evidence no other determination would have been justified.

I.

IT WAS DEFINITELY AGREED BETWEEN THE RICHFIELD COMPANY AND APPELLANT THAT ONLY THE SO-CALLED SHORT-TERM DRAFTS SHOULD BE DEPOSITED AS SECURITY UNDER THE ACCEPTANCE AGREEMENTS AND THAT THE REMAINING DRAFTS SHOULD BE DEPOSITED FOR COLLECTION ONLY.

Appellee's claim that it was agreed between appellant and Richfield Company that only drafts having their maturity and the proceeds of which would be received in San Francisco not later than one day in advance of the maturity of the acceptances would be eligible or received for deposit under the acceptance agreements, and that it was further agreed that none of the Birla Bros. drafts having a maturity of 180 days, nor other drafts, unless meeting the requirements just specified, could be eligible for or received as security under any acceptance agreement, but that these last mentioned drafts would be deposited with appellant solely for the purpose of collection, is comprehensibly given consideration in our statement of facts and needs no reiteration.

At the very threshold of this discussion we invite the court's attention to a proposition which effectively disposes of appellant's contention that all foreign drafts were under the acceptances. It is admitted by both parties that regardless of the other details of the arrangement it was definitely agreed that all acceptances issued should mature in ninety days. It is likewise conceded that the acceptances would have to be paid at maturity and that the moneys would have to be available for this purpose no longer than one day prior to the date of such maturity.

The issuance and release of bank acceptances is part of the routine business of a commercial bank. Upon each of these transactions it charges a commission. It invites business of this character, provided, of course, it is assured that the money to become due upon the acceptances at their maturity will be forthcoming. It is therefore obvious that if the Richfield Company had secured appellant to the extent of the money becoming due upon the acceptances no reluctance would have existed on the part of the bank to execute and release the acceptances required. It is equally obvious that drafts not payable either on or in advance of the maturity dates of the acceptances would not be acceptable to appellant as security upon which to issue its bank acceptances.

It will be recalled by the court that during the August visit of Hall the financial stability of the foreign customers of Richfield was discussed. (R. 340-1.) Later a list of these foreign creditors was submitted to the bank for consideration and investigation. (R. 345.) Appellant undoubtedly satisfied itself that all of these customers were financially responsible except Birla Bros. Ltd. as to which certain adverse information was received from its correspondent in Calcutta. (R. 346.) As to the latter, however, no objection could be urged against sight drafts drawn by it *for the reason that such sight drafts had to be paid in full before the documents representing the shipment would be delivered.* (R. 401.) Regardless of the agreement, therefore, it must be apparent that if the Richfield Company had agreed to deliver to appellant sufficient sight drafts drawn upon Birla Bros. Ltd. and

other drafts drawn upon its other foreign customers payable prior to the maturity of the acceptances to be issued by it, such drafts would have been accepted by the bank as ample security for the obligation assumed by it in executing and releasing such acceptances. On the other hand, no believable reason could exist for the delivery to appellant of drafts having a maturity long after the due date of the acceptances—in some instances many months thereafter—to satisfy appellant that the acceptances would be paid when due.

Particularly considering the then financial condition of Richfield Company and its constant need of funds, unless therefore the agreement between the parties provided for a continuing or revolving credit, it is incredible that appellant required or Richfield Company agreed to deposit with it any of these long term drafts other than for purposes of collection. Having demonstrated, as we believe we have, that there was no agreement for any such continuing or revolving credit (supra) it necessarily follows that it is unreasonable to assume that the understanding claimed by appellant that *all* collections, regardless of the maturity of the drafts, were agreed to be deposited as security for the acceptance agreements. However, aside from the probabilities of the case that no such agreement was either made or intended to be made is definitely and conclusively established by the evidence to which reference has already been made.

II.

REGARDLESS OF THE DETERMINATION OF ANY OTHER PROPOSITION, THE EVIDENCE CONCLUSIVELY ESTABLISHES THAT NONE OF THE 180-DAY BIRLA BROS. DRAFTS WAS UNDER EITHER OF THE ACCEPTANCE AGREEMENTS, BUT ON THE CONTRARY WERE DEPOSITED SOLELY FOR COLLECTION.

Without further elaborating upon this point, which has already been given ample consideration in the preceding pages of this brief, we are making the point so as to call it to the specific attention of the court and are contenting ourselves with the statement here that a consideration of all of the evidence must impel the court to the conclusion that, regardless of any other issue involved in this controversy, it has been convincingly proven that it was never understood or agreed that the 180-day sight drafts accepted by Birla Bros. Ltd. should be deemed to be under the acceptance agreements, but, on the contrary, that so far as these drafts were concerned, none of which could by any possibility have become payable until long after the acceptances had matured, they were deposited exclusively for the purpose of collection.

III.

THE ACCEPTANCE AGREEMENTS BEING SILENT RESPECTING THE SECURITIES TO WHICH THEY RELATE, PAROL EVIDENCE WAS ADMISSIBLE FOR THE PURPOSE OF IDENTIFYING SUCH SECURITIES AND ALSO TO ESTABLISH THE AGREEMENT RELATING TO THE REMAINING DRAFTS.

A cursory examination of the two agreements introduced in evidence (Plff's. Exs. 16 and 38) will show that none of the drafts intended to be deposited under either agreement as security for the liquidation of the acceptances to be thereafter issued by appellant were described or identified in any manner. Imputing legal stability to these agreements, notwithstanding such silence, it must be apparent that parol evidence was admissible for the purpose of identifying the securities to which the agreement related and upon which its provisions would become fastened. This must necessarily be so because in the absence of such parol evidence the agreements themselves would be entirely innocuous and of no materiality in this controversy. While in the court below this legal proposition was disputed, or at least not conceded, appellant here admits that the rule is as stated because in its brief it is stated (p. 109):

> "They (referring to authorities) were cited by the court in support of its conclusion that since the acceptance agreement is blank as to the drafts deposited thereunder, parol evidence was admissible to prove which drafts were and which were not so deposited. *There can be no question about the correctness of this ruling.*"

It is contended, however, by appellant that if this court determines that ALL drafts were deposited under the acceptance agreements, then the testimony of Hall and Pope respecting the oral agreement waiving the contractual lien provided for in the acceptance agreements would be inadmissible as being in conflict with the provisions of such acceptance agreements. (Appellant's Br. pp. 109-10.)

We have no hesitation in conceding that if *all* of the drafts were proven to be under the acceptance agreements, the conclusion stated by appellant would follow. However, such concession is unnecessary because, as already pointed out, the lower court found on credible evidence that only the so-called short term drafts were deposited under the acceptance agreements and that *none* of the drafts, the proceeds of which are here involved, were so deposited or were deposited for any purpose other than for collection. While this finding of the lower court is attacked upon the ground that it is against the weight of the evidence, it is submitted by appellee that this court is not concerned upon this appeal with the weight of the evidence, and that if it determines that there is *sufficient evidence* in the record to sustain the finding criticized, it must be upheld. Appellee contends, however, that not only is the evidence sufficient to sustain this finding, but furthermore, that it is supported by the great weight as well as the preponderance of the evidence.

In connection with this subject-matter, however, it is contended by appellant that the finding of the lower court to the effect that the drafts NOT under

the acceptance agreements and their proceeds should be kept separate and apart from all other transactions between Richfield and the bank is not supported by the evidence because the agreement testified to by Hall and Pope related to all drafts. (Applt's Br. p. 82.) That this contention is untenable is readily apparent. The agreement between appellant and Richfield was negotiated in August, 1930, prior to the execution or delivery of any acceptance agreement. It was again confirmed and approved on October 6, 1930, upon the return to San Francisco of Hall and Pope, when the first acceptance agreement was delivered. The only reason why the drafts placed under the acceptance agreements are not affected by the oral agreement entered into between Richfield Company and appellant is because of the provisions of the written acceptance agreement in which it is provided that all securities placed under such agreement likewise stand as security for all other indebtedness due the bank. It is conceded that all of the drafts were primarily deposited with appellant for collection, although certain of these drafts, to-wit, the so-called short term drafts, were found by the court to be likewise deposited as security under the acceptance agreements. If none of the drafts had been deposited under the acceptance agreements ALL, as well as their proceeds, would have been covered by the special oral agreement depriving appellant of its banker's lien and right of setoff. When, however, Richfield placed certain of these drafts under the acceptance agreement, such drafts were thereby deprived of the benefit of such oral agreement because of the provision found in

the acceptance agreement to which reference is above made. The mere circumstance, however, that Richfield, by its action in placing the so-called short term drafts under the acceptance agreements prevented the oral agreement from longer attaching to such short term drafts in no way removed the remaining drafts not so deposited from the purview of such oral agreement. The only reason why the previously entered into oral agreement could not be established as to the so-called short term drafts placed under the written acceptance agreements was because the terms of such acceptance agreements could not be varied by parol. Such objection, however, could not and did not apply to the remaining drafts not so deposited.

That the lower court gave recognition to the situation just narrated is clearly made manifest by its findings. It was generally found by the court that

> "during the month of August, 1930, an oral agreement was entered into between said Richfield Oil Company of California and said defendant bank whereby said Richfield Oil Company of California agreed to deposit with said bank for collection only, drafts drawn by said Richfield Oil Company of California on certain of its customers residing in foreign countries. * * * It was then and there further orally agreed by and between said Richfield Oil Company of California and said bank that the collection of said foreign drafts by said bank should be entirely separate and apart from all other financial obligations and transactions theretofore or thereafter to be conducted in the ordinary course of business between said parties." (Finding VIII, R. 183, 4.)

It was further specifically found by said court that "excepting as to draft No. 103102 hereinabove in Finding XV hereof referred to (not involved in this appeal) only those foreign drafts drawn by Richfield Oil Company of California the proceeds of which could be and actually were received by said defendant bank at San Francisco at least one day before the maturity date of the acceptances secured thereby were the subject-matter of the acceptance agreement dated October 4, 1930, and the supplemental acceptance agreement dated November 28, 1930. All other foreign drafts drawn by Richfield Oil Company of California, including those set forth in Finding VIII hereof (those involved in this appeal) were deposited with defendant bank by said Richfield Oil Company of California for collection only and form the subject-matter of the oral agreement made and entered into between said parties during the month of August, 1930." (Finding XVII, R. 189-90.)

It will thus be observed that while the lower court, in accord with the evidence, determined that the agreement contended for by appellee was entered into during August 1930, before either acceptance agreement was executed or delivered, it further determined that (as a result of the execution and delivery of said acceptance agreements) the oral agreement relied on by appellee covered and attached to only the drafts not deposited as security under said acceptance agreements. Not only is there no inconsistency in the situation here described, but on the contrary, it is strictly in accord with the understanding of the parties as reflected by the evidence.

IV.

THE PARAMOUNT PURPOSE SOUGHT TO BE ACCOMPLISHED BY THE APPOINTMENT OF A RECEIVER WAS THE CONTINUANCE OF THE BUSINESS OF THE RICHFIELD OIL COMPANY.

What the bank creditors of Richfield were attempting to accomplish by the appointment of a receiver was primarily to permit its business to continue as formerly and without interruption and thereby to prevent a sacrifice of its properties, it being remembered that if such procedure were pursued there was at least a possibility that the indebtedness due the creditor banks would in whole or in part be ultimately paid. The only alternative was bankruptcy.

This paramount purpose is shown by the pleadings in the receivership proceedings, both primary and ancillary. It is also shown by the order made in each receivership proceeding appointing appellee receiver of Richfield Oil Company, its properties and business. It was conclusively proven by the testimony of Mr. McDuffie, the receiver, as well as by the evidence of Mr. Nolan, one of the chief executive officers of the Bank of America, the principal bank creditor of Richfield Company. No necessity exists to reiterate here any testimony upon this subject because it is specifically mentioned in our "Statement of Facts" and no evidence in opposition was introduced.

V.

THE PURPOSE SOUGHT TO BE ACCOMPLISHED BY THE AGREEMENT EVIDENCED BY RECEIVER'S TELEGRAM OF JANUARY 16, 1931 (Plf's. Ex. 2) AND APPELLANT'S RESPONSE OF JANUARY 16, 1931 (Plf's. Ex. 3) AND THE ACQUIESCENCE THEREIN OF THE OTHER BANK CREDITORS WAS TO ENABLE THE RECEIVER TO CONTINUE THE BUSINESS WITHOUT INTERRUPTION.

We have already pointed out the paramount purpose of the appointment of the receiver of Richfield Company and its properties and business. Such proceedings would have been futile if, after his appointment and qualification, he had been deprived of the assets, credits and funds, the possession of *all* of which was essential to the continuance of the corporation's business and the protection of its properties.

The bank creditors of the Richfield Company, as has already been shown, were not only thoroughly familiar with its financial condition as well as its necessities, but likewise knew that the inability of the receiver to carry on the business of the corporation would immediately result in bankruptcy. Almost immediately following his appointment he learned that certain of these bank creditors had offset cash balances belonging to Richfield in their possession as against the indebtedness due to them. He quickly realized that unless such cash balances were restored and all other bank creditors would agree to refrain from taking such action, *and unless there would be placed at his disposal all of the assets, credits and balances* of Richfield Company, it would be useless for him to attempt to carry out or accomplish the

very purpose for which he was appointed. Avoiding any possible delay, a meeting was called, which was attended by representatives of all bank creditors excepting appellant and a Seattle bank. To them he outlined the situation and made known in no uncertain language that unless he had complete control of the company's property, and there would be turned over to him all of its *assets, credits* and *cash balances,* he would forthwith retire and permit the company to go into bankruptcy. It was to avoid this result that the agreement among the bankers and between them and the receiver was negotiated. At the conclusion of this meeting, a telegram was sent to all of the banks, including appellant, which was prefaced

> "as receiver I am ordered by federal court to take over *all assets including cash in bank* Stop While you have undoubtedly right of offset such right if exercised will seriously cripple receivers operations"

and concluded

> "local banks have indicated they will acquiesce in this program."

In order that appellant should be apprised of the exact situation with which the receiver was confronted, as well as what would follow a lack of full cooperation on the part of the bank creditors, at the request of the receiver there was transmitted to the appellant by telephone the substance of the statements made during the course of the meeting. The preceding day, appellant had already offset Richfield's cash balances towards the indebtedness owing it by the

company. On the same day there had been transmitted to it by the receiver a copy of the order appointing him such receiver, wherein he was authorized and directed to take into his exclusive possession all of the business, property and assets of the company. Likewise there had been transmitted to appellant receiver's telegram of January 16, 1931. (Plff's. Ex. 2.) At this time appellant was thoroughly familiar with the embarrassed financial condition of Richfield Company and undoubtedly realized that in order for the receiver to continue the conduct of the company's business it would be necessary for him to have available all funds and *credits* which in the ordinary course of business would come into his possession. With these matters in mind, defendant replied by wire to receiver's telegram of January 16, 1931, stating that providing all other banks were willing to do so, it would restore to the receiver's account the cash balances offset by it on the preceding day, but that it was holding *"certain"* collections as security for acceptances and *"continued"* to reserve its right of banker's lien against *"those"* collections.

That in construing and interpreting an agreement the object intended to be attained is of paramount importance is the well-settled law of California. Upon this subject in the recent case of

> *In re City and County of San Francisco,* 191 Cal. 172, at page 177,

Mr. Justice Sewell, speaking for the court, said:

> "The object to be attained is, of course, the principal factor of consideration in the construction of contracts."

Keeping in view the conceded purpose of the receivership, as well as the surrounding facts and circumstances, appellee contended upon the trial, as he does here, that by appellant's telegram of January 16, 1931, which was prepared and transmitted to the receiver after appellant had received the receiver's wire (Plff's. Ex. 2), and after it had been advised respecting the subject matter of the conferences between the receiver and the bank creditors, appellant intended to waive any banker's lien or right of setoff that it then possessed respecting the drafts in its possession and their proceeds excepting as to the drafts deposited under the acceptance agreements.

While in our judgment, reading the telegram of appellant (Plff's. Ex. 3) with the telegram to which it responds (Plff's. Ex. 2), and in the light of the surrounding circumstances, no other possible construction can be given to Plaintiff's Exhibit 3, if recourse is had to the familiar rules governing the interpretation of contracts, as enunciated by tribunals of last resort as well as by legislative enactments, any doubt upon this subject must be dispelled. To some of these principles we will now briefly direct the court's attention.

VI.

WHERE A LATENT AMBIGUITY EXISTS IN AN INSTRUMENT OR IT IS SUSCEPTIBLE OF TWO OR MORE CONSTRUCTIONS WITHOUT DOING VIOLENCE TO ANY OF THE SETTLED RULES OF CONSTRUCTION, THE CIRCUMSTANCES UNDER WHICH THE AGREEMENT WAS MADE AND THE CONVERSATIONS BETWEEN THE PARTIES AT THE TIME OF THE NEGOTIATIONS RESULTING IN THE MAKING OF THE AGREEMENT ARE ADMISSIBLE EVIDENCE.

Sec. 1860, *C. C. P.*, provides:

> "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

Sec. 1657, *C. C.*, provides:

> "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

In

Balfour v. Fresno Canal etc. Co., 109 Cal. 221, which is the leading case in California, Van Fleet, Judge, held:

> "Where the language of a contract is fairly susceptible of one or two interpretations without doing violence to its usual and ordinary import, or some established rule of construction, an ambiguity arises for the explanation of which extrinsic evidence may be resorted to.
>
> For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove

that they intended and understood the language in the sense contended for; and for that purpose the conversations between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown. (Citing cases.)"

In

Gilde v. Shuster, 83 Cal. App. 537,

it was declared:

"It is the duty of a court, when the language of a written contract is not clear, positive and certain, to consult the conditions, situation and the motives of the respective parties for the purpose of ascertaining their intention. * * * Where there is a latent ambiguity in a written contract, and the language will admit of more than one interpretation, or if the intention of the parties is doubtful from a reading of the document, parol evidence of the circumstances and situation of the parties may be considered to ascertain their true intention, and in this matter an issue of fact may be presented."

A recent case decided by the Court of Appeals of this Circuit in which the question under discussion was involved is

Modoc Co. Bank v. Ringling, 7 Fed. (2d) 535,

where it is said (p. 540):

"It is a fundamental rule that in the construction of contract the courts may look not only to the language employed, but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties

possessed when the contract was made." (Citing a number of federal decisions, among others, decisions of the United States Supreme Court.)

That in considering defendant's wire of January 16, 1931 (Plff's. Ex. 3), resort should be had to extrinsic evidence is made manifest by the decision of Mr. Justice Sanborn, subsequently a justice of the Supreme Court of the United States, in

Pressed Steel Car Co. v. Eastern R. Co., 121 Fed. 609 (C. C. A. 8th Cir.),

where he said:

"To the counsel of each of these parties this contract seems plain and unambiguous and its meaning certain, and *yet it has an entirely different significance to the representatives of each of these corporations.* This fact, repeated perusals and a careful study of the writing present very convincing evidence that its terms are not altogether clear, that they were well calculated to raise this controversy that they were susceptible of two constructions. It remains to determine which is the more natural, probable and rational interpretation.

There is no evidence in the record that either of the two interpretations urged upon our consideration would not deter either of the parties from entering into the agreement. What they intended to stipulate, what they understood the contract to mean, and what they would have done if their interpretation of it had been different can be deduced from the contract itself, the situation of the parties and the circumstances surrounding them when they made it."

See also

Sheely v. Byers, 73 Cal. App. 44;

Weslin v. Lapham, 77 Cal. App. 137;

Los Angeles High School v. Quinn, 195 Cal. 377;

Hind v. Easterly Products Co., 195 Cal. 653.

Further multiplication of these decisions, we deem entirely unnecessary.

VII.

THE INTENTION OF THE PARTIES IN ENTERING INTO AN AGREEMENT, WHEN ASCERTAINED, SHOULD CONTROL ITS INTERPRETATION AND CONSTRUCTION.

In

Regsloff v. Smith, 79 Cal. App. 443, at page 452, it is said:

> "The purpose of construction is to ascertain the intent of the parties. Where the intent of the parties is ascertained *it must always take precedence over the literal sense of terms.*"

We have already pointed out that the undoubted intention of the parties in entering into the agreement between the receiver and the bank creditors of Richfield was to enable the receiver to carry on without interruption the business of the corporation, and by so doing, conserve its property and assets and save its value as a going concern, to the end that bankruptcy would be avoided, and its creditors receive at least a part of the indebtedness due them.

In view of the uncontradicted record as to this phase of the case, there could be no other intention. That such intention, when ascertained by the court, should control its interpretation and construction of the contract being considered is no longer subject to dispute.

Sec. 1636, *Civil Code,* provides:

> "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting; so far as the same is ascertainable and lawful."

In

Ogburn v. Travelers Ins. Co., 207 Cal. 50,

it is said:

"In the interpretation of a written instrument the primary object is to ascertain and carry out the *intention of the parties* thereto. * * *"

See also

Gilde v. Shuster, 83 Cal. App. 537;
Snyder v. Holt Mfg. Co., 134 Cal. 325;
Turner v. Kearny, 116 Cal. 65;
Shoemaker v. Acker, 116 Cal. 239;
Delano v. Jacoby, 96 Cal. 675;
Stein v. Archibald, 151 Cal. 220.

VIII.

CONTEMPORANEOUS AND PRACTICAL CONSTRUCTION OF AN INSTRUMENT BY THE PARTIES AND THEIR SUBSEQUENT ACTIONS AND CONDUCT AFFORD CONVINCING EVIDENCE AS TO ITS MEANING AND EFFECT, WHERE ITS TERMS ARE AMBIGUOUS OR DOUBTFUL.

In the "Statement of Facts" we commented upon the contemporaneous and subsequent conduct, acts and correspondence of the parties with reference to the agreement evidenced by Plff's. Exs. 2 and 3. We pointed out that between the date of the appointment of the receiver and May 8, 1931, such conduct, acts and correspondence were ALL consistent with the receiver's interpretation of the agreement and inconsistent with the construction now sought to be placed thereon by appellant. Under these circumstances, we do not believe it essential to again review any of these facts because we appreciate that they are well within the memory of the court.

It is submitted that under the law, the construction thus given to the agreement by the parties should be the construction placed upon it by this court.

In

Keith v. Electric Engineering Co., 136 Cal. 184,

the court in giving recognition to the rule here invoked, quoted from a learned English jurist as follows:

> " 'Tell me,' said Lord Chancellor Sugden, 'what you have done under a deed, and I will tell you what the deed means.' "

In

Mayberry v. Alhambra, 125 Cal. 445,

it was held

"that where the provisions of a contract are doubtful, its practical construction by the parties is controlling."

In

Rockwell v. Light, 6 Cal. App. 563-5,

it is said:

"When the meaning of the language of a contract is considered doubtful, the acts of the parties done under it afford one of the most reliable clues to the intention of the parties."

The federal decisions upon this subject are equally conclusive upon this subject.

In

Christenson v. Gorton-Pew Fisheries Co., 8 Fed. (2d) 689 (C. C. A.),

it is said:

"The terms being indefinite and somewhat uncertain, the construction placed upon them as indicated by the writings of the parties and their conduct is always *controlling and binding* upon them. (Citing cases.)

The courts never construe a contract ambiguous in its terms contrary to the construction the parties themselves have placed upon it. The parties have by their writings committed themselves to a practical construction, the function to construe the contract under such circumstances is for the court."

In

Sternberg v. Drainage District, 44 Fed. (2d) 560 (C. C. A.),

the rule is thus stated:

> "The practical construction given to this contract by the parties as indicated by all the facts and surrounding circumstances is entitled to great, if not controlling, weight in determining its proper interpretation."

In

Vital v. Kerr, 297 Fed. 959,

it is said:

> "But where the meaning of a contract is not clearly apparent upon its face, but is more or less ambiguous, the interpretation given to the contract by the parties themselves, as shown by their acts, will be adopted by the court, and to this end not only the acts, but the declarations of the parties may be considered. (Citing cases.)"

Without quoting from the decisions, we call the court's attention to

San Francisco I. & M. Co. v. Sweet Steel Co., 23 Fed. (2d) 783 (C. C. A. Cal);

Cutting v. Bryan, 30 Fed. (2d) 754 (C. C. A. Cal.);

Indian Territory v. Bartlesville Zinc Co., 288 Fed. 273 (C. C. A.);

Federal Surety Co. v. Bentley & Sons Co., 51 Fed. (2d) 24 (C. C. A.);

Harris v. Morse, 54 Fed. (2d) 109.

IX.

THE COURT SHOULD CONSTRUE THE TELEGRAM OF JANUARY 16, 1931, IN THE SENSE IN WHICH APPELLANT BELIEVED IT WAS UNDERSTOOD BY THE RECEIVER AND OTHER BANK CREDITORS OF RICHFIELD COMPANY.

Viewed in the light of the evidence introduced during the trial, no doubt can possibly exist with respect to the receiver's understanding of appellant's telegram of January 16, 1931. (Plff's. Ex. 3.) The same situation exists with respect to the bank creditors, to whose attention it was called by the receiver. That both the receiver and these bank creditors understood that by its telegram appellant intended to and did waive its banker's lien and right of setoff as against all assets, credits and balances, including cash balances in its possession, excepting as to CERTAIN drafts and their proceeds then held by it as security for its acceptances, and that as to all other drafts and their proceeds, such banker's lien and right of setoff were waived, is conclusively disclosed by the undisputed testimony. Every act of the receiver, as well as every letter written or word spoken by him from the date of its receipt until and including the trial of this case eloquently bespeak his implicit belief that such was the intention of appellant. The action of the Security First National Bank in crediting to the account of the receiver the proceeds of the various drafts in its possession at the time of the appointment of the receiver demonstrates its belief. The protests of the creditor bankers upon learning of the action of appellant is seizing the funds, the title to which is here in dispute, points to their belief.

Proof alone of the background to Plff's. Ex. 3, and the purpose sought to be achieved by the demand of the receiver would itself be sufficient to establish that appellant believed that the receiver and the creditor banks understood the telegram in accord with the meaning imputed to it by them. If, however, there ever was any doubt upon this subject, it is only necessary to direct the court's attention to the correspondence passing between the receiver and appellant when it undertook to retain the $7749.58, being net proceeds of certain drafts remaining in its possession after the payment in full of *all* acceptances issued by it. *The sole basis of the receiver's demand for payment to him of these proceeds was appellant's telegram to the receiver.* (Plff's. Ex. 3.) This correspondence not only proves the sense in which the receiver understood Plff's. Ex. 3 and knowledge of such understanding on the part of appellant, but the subsequent action of the bank in forthwith crediting to the account of receiver the net proceeds of these drafts likewise proves that the bank itself interpreted and construed its telegram in accord with the construction placed upon it by the receiver. That such interpretation should be given Plff's. Ex. 3 by this court is clear.

Sec. 1649, *Civil Code,* provides:

> "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it, that the promisee understood it."

Sec. 1864, *Code of Civil Procedure,* provides:

"When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be done which is most favorable to the party in whose favor the provision was made."

Farren v. Willard, 76 Cal. App. 460, 466;

El Dara Oil Co. v. Gibson, 201 Cal. 231, 236;

McClintick v. Leonards, 103 Cal. App. 768;

Lang v. Pacific Brewing Co., 44 Cal. App. 618, 621;

Kelly v. Great Western etc. Co., 46 Cal. App. 747, 752.

X.

THE LANGUAGE OF THE TELEGRAM OF JANUARY 16, 1931 (Plff's. Ex. 3), SHOULD BE INTERPRETED MOST STRONGLY AGAINST THE APPELLANT, BY WHOM IT WAS PREPARED, AND WHO WAS THE PROMISOR THEREUNDER.

Whatever uncertainty or ambiguity appears in the telegram above mentioned, read in connection with the receiver's telegram to appellant (Plff's. Ex. 2) was caused by appellant, by whom it was prepared, and who was the promisor thereunder. Under these circumstances, any ambiguity in the telegram should be interpreted most strongly against it.

Sec. 1654, *Civil Code,* provides:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party. * * *"

In

> *Sternberg v. Drainage Dist. etc.,* 44 Fed. (2d) 560, at page 562,

the court states:

> "It is first to be observed that the instrument forming the basis of this controversy was prepared by the contractors and presented to the commissioners of the defendant. If the contract is ambiguous the plaintiff is responsible for its ambiguity and under such circumstances, the contract should be construed most strongly against the party preparing it. (Phoenix Ins. Co. v. Slaughter, 12 Wall. 404, 20 L. ed. 444; Bijur Motor Lighting Co. v. Eclipse Machine Co. (D.

C.), 237 Fed. 89; Caldwell v. Twin Falls Salmon River Land Co. (D. C.), 225 Fed. 584; Christian v. First Nat. Bank (C. C. A.), 155 Fed. 705; Van Zandt v. Hanover Nat. Bank (C. C. A.), 149 Fed. 127; etc."

In

In re New York Towing & Transportation Corp., 57 Fed. (2d) 337, at page 339,

the court uses the following language:

"It appears that the contract in question was prepared by the Ford Motor Company and accepted by the Towing Corporation. Under these circumstances, if deemed to be ambiguous, it may be my duty to resolve any doubt against the party preparing it. See The Pensacola (C. C. A. 5), 263 Fed. 661; Drainage Dist. No. 1 v. Rude (C. C. A. 8), 21 Fed. (2d) 257."

In

Continental Oil Co. v. Fisher, 55 Fed. (2d) 14, at page 16,

it is said:

"It may be true the intention of the Continental Oil Company was to contract for this period of reassignment. Their tender indicated they had that theory of the 'modification agreement'. But why was the option not mentioned? A capable lawyer for the company drew the contract, and even if we assume the instrument to be ambiguous in this respect, the rule applies that the doubt be resolved against the party who drew it." (Citing many cases.)

In

East & West Ins. Co. etc. v. Fidel., 49 Fed. (2d) 35 (C. C. A.),

the rule is thus stated at page 38:

> "After an ambiguity is established, a contract is construed strictly against the party which drafted it. Graham v. Busines Men's Assurance Co. (C. C. A. 10), 43 Fed. (2d) 673, and cases therein cited."

XI.

THE CONSTRUCTION PLACED BY APPELLANT UPON ITS TELEGRAM (Plff's. Ex. 3), THAT IT CONTINUED TO RESERVE A BANKER'S LIEN UPON ALL COLLECTIONS THERETOFORE DEPOSITED WITH IT BY RICHFIELD FOR THE PURPOSE OF ENFORCING THE LATTER TO PAY A GENERAL INDEBTEDNESS DUE IT, IF ADOPTED, WOULD LEAD TO AN ABSURDITY AND RENDER UNNECESSARY AND MEANINGLESS SPECIFIC LANGUAGE INTENTIONALLY USED BY IT IN ITS TELEGRAM.

To adopt the construction which appellant seeks to have this court place upon its telegram (Plff's. Ex. 3) in its endeavor to retain the proceeds of drafts to which it is not entitled, it will be necessary for the court to exclude from consideration language deliberately inserted in the telegram and will involve an absurdity never intended or contemplated by appellant.

If appellant had merely intended to restore the cash balance belonging to the Richfield Company which it had already offset, it would never have inserted in the telegram the last paragraph placed therein, which is one of the most important portions of the telegram, and one upon which the receiver and the bank creditors relied. It would have merely stated:

> "Replying telegram we are willing to restore into your name as receiver Richfield balance in checking account provided we are notified by you that all company banks have taken similar action."

But appellant realized that the telegram, if confined alone to the statement above quoted, which constitutes the first paragraph in its telegram, would not have

been satisfying either to the receiver or to the other bank creditors. In the preparation of this telegram, it had in mind primarily the purpose sought to be accomplished by the receivership proceedings, to which we have already alluded, viz., the continuance of the business of Richfield Company. It also had in mind not only the preliminary statement contained in the receiver's telegram to it (Plff's. Ex. 2), viz.,

> "As receiver I am ordered by federal court to take over *all assets including cash in banks*",

but as well as the information conveyed to it through Mr. Nolan, one of the framers of the telegram, respecting the subject matter of the conference held that very day between the receiver and the representatives of the creditor banks. While it had in its possession all drafts of Richfield Company for collection, it realized that the other creditor banks did not have in mind the fact that it had advanced to Richfield Company funds through the medium of acceptances, which were secured by some of these foreign drafts placed with it for collection. It undoubtedly believed that it should be reimbursed by Richfield Company for the amount of these advances made by it through acceptances in the same manner that any other bank would be entitled to be reimbursed for advances made by it through the medium of discounting drafts placed with it for collection. With these matters in mind, and believing it only equitable that it should be repaid the amount of these advances from the proceeds of the collections of the drafts securing said acceptances, and further believing it only fair to the other creditor

banks to advise them of that fact, it therefore added the second paragraph of its wire of January 16, 1931, which, paraphrased, was intended by it to mean the following:

> "We have advanced money to Richfield Oil Company through the medium of acceptances, which acceptances are secured by certain only of its collections and we continue to reserve all our rights of security as against these particular collections."

Otherwise appellant intended to deliver to the receiver *"all assets,* including cash in bank". Its specific reservation of *"certain"* only of the collections held by it constituted a waiver as to all other collections in its possession which the bank intended to be available to the receiver. This intent of the bank was clearly evidenced by its subsequent conduct from March 5, 1931, when the acceptances were repaid in full, until May 8, 1931, during all of such time it turned over to the receiver the proceeds of all other collections received by it.

XII.

AN EXPRESS RESERVATION OF A LIEN UPON CERTAIN PROPERTY, OR TO A CERTAIN EXTENT, CONSTITUTES A WAIVER AS TO ALL OTHER PROPERTY OR TO A GREATER EXTENT THAN THAT RESERVED.

In appellant's telegram (Plff's. Ex. 3) the words of reservation are:

> "Please understand that we *continue* to reserve all our rights for banker's lien against *these collections.*"

The collections referred to as expressed in the telegram are

> "We are holding *certain* collections as security for acceptances."

It will be observed that the banker's lien which the appellant intends to "continue to reserve" is its lien against the *"certain"* collections previously referred to. It is obvious that under this reservation it cannot be claimed by appellant that it was reserving any lien as against any of the collections in its possession excepting the *"certain"* collections which at the time of the sending of the telegram it held as security for the acceptances issued by it. In using this language appellant intended to and did waive by implication any lien it then had upon or claimed it then had to any property belonging to Richfield Oil Company within its possession or under its control other than and excepting the collections deposited as security for the acceptances. That such limited reservation constituted a waiver of any lien greater in extent than that re-

served or upon property other than that described or identified has been definitely settled by the United States Supreme Court in

Brown v. Gilman, 14 U. S. 564,

where the court, at page 573, uses the following language:

> "An express contract that the lien shall be retained to a specific extent is equivalent to a waiver of the lien to any greater extent."

See also

Fendall v. Miller, 196 Pac. (Ore.) 381.,

where the court states the rule of law as follows:

> "It is a well settled rule of law that where there is an exception or reservation of one thing, it will be presumed that no other exceptions or reservations are intended than those expressed."

In

Wilson v. Alcatraz Asphalt Co., 142 Cal. 182,

the court held:

> "The contract, and each and every clause thereof, must be read together, so as to arrive at its true intent and meaning, and where the contract recites that, unless for certain excepted causes, plaintiff shall be unable to supply the oil demanded by the contract, plaintiff shall at all times be required to furnish same, the contract excludes all other causes by implication, and the plaintiff must supply the oil required by the contract by the delivery of oil produced by other parties, where such delivery is not stipulated against."

The above principle is also expressed in the Latin maxim:

"Expressio unius est exclusio alterius."

See also

2 *Elliott on Contracts,* Secs. 1532 and 1533,

wherein the above quoted maxim is referred to and commented upon.

In

Crosby v. Patch, 18 Cal. 438,

it is said:

> "The specification of particular sections as repealed is the equivalent to a declaration that the remaining sections shall continue in force."

In

Fay v. District Court of Appeal, 200 Cal. 522,

the rule for which we contend is thus expressed:

> "The application of this principle to the instant problem is attended with another principle of interpretation of almost equal importance, which is that when in any enactment there appears an express modification or repeal of certain provisions in a former enactment, such express modification or repeal of the portions thereof thus affected will be held to disclose the full intent of the framers of the later enactment as to how much or what portion of the former it was intended to modify or repeal. This upon the principle *expressio unius est exclusio alterius;* and in such a case an implied modification or repeal of such portions of the former law as are not expressly referred to as being repealed or modified is to be all the more avoided in determining the intent and effect of the latter enactment."

Moreover the Supreme Court of the United States has recognized this fundamental rule of statutory construction in the case of

Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 929.

Furthermore, the use of the word *"continue"* in Plff's. Ex. 3 is itself significant as bearing upon the interpretation of this wire. In this connection the evidence shows that prior to the date of the appointment of the receiver, none of the proceeds of any of the drafts which up to that date had been collected by appellant had been credited in payment of the general indebtedness of the Richfield Company. All of these proceeds were either deposited in anticipation of meeting acceptances or applied in payment of the acceptances released on October 8, 1930, totaling $115,000 or credited to the account of the Richfield Company. It will thus be seen that, judging from the conduct of appellant between the date upon which the first drafts were deposited, viz.: October 8, 1930, and the date of the appointment of the receiver, all proceeds of drafts not reserved for use or used in meeting acceptances were returned and credited to Richfield Company. In terpreting the word *"continue"* in the telegram of appellant (Plff's. Ex. 3) in the light of its conduct of appellant, no difficulty should be experienced in construing the character and extent of the lien reserved by the appellant to a lien only upon the drafts deposited under the acceptance agreements.

XIII.

APPELLANT'S TELEGRAM DATED JANUARY 16, 1931 (Plff's. Ex. 3), RECOGNIZES THAT ONLY A CERTAIN PORTION OF THE DRAFTS DEPOSITED FOR COLLECTION WERE "HELD AS SECURITY FOR ACCEPTANCES", AND THAT ONLY AS TO SUCH DRAFTS DID IT CONTINUE TO RESERVE ITS ALLEGED BANKER'S LIEN.

With respect to the subject under consideration, appellant's telegram (Plff's. Ex. 3) reads as follows:

> "We are holding 'certain' collections as security for acceptances. Please understand that we *continue* to reserve all our rights for banker's lien *against these collections.*"

Preliminarily, it may be observed that if this court holds that the evidence is sufficient to sustain the finding of the lower court that only *"certain"* and not all of the foreign drafts were deposited under the acceptance agreements, it necessarily follows that regardless of what construction is placed upon Plff's. Ex. 3, the reservation by appellant of its banker's lien applies only to such specified drafts. It would have no application whatever to the remaining drafts deposited solely for collection.

Upon the evidence already called to the court's attention, it must be apparent that when appellant in its telegram (Plff's. Ex. 3) used the word *"certain"* in referring to the collections held by it as security for acceptances, and as to which it was reserving a banker's lien, it intended *ex industria* to use, as it did, a word of limitation and qualification, and thereby intended to and did refer exclusively but to those collections which it then had in its possession deposited under the acceptance agreements.

That the word *"certain"* under the circumstances here proven, and in the sense in which appellant used the word, and in which the appellee and the creditor banks understood such use is a word of limitation, and that it should be given such interpretation is indisputable.

In

Webster's New International Dictionary

"certain" is defined to be

> "one or some among possible others; one or some known only as of a specified name or character."

See also

Braden v. Mitchell, 59 Cal. App. 59;
State v. Burdick, 15 R. I. 239, 2 Atl. 764.

But even though the word *"certain"* has a dual meaning, depending upon the purpose of its use, its interpretation and meaning, taking into consideration the surrounding circumstances, is a question of fact for the trial court, by which an appellate court is bound.

XIV.

THE AGREEMENT BETWEEN HALL AND THE OFFICIALS OF APPELLANT THAT THE DRAFTS AND THEIR PROCEEDS HEREIN INVOLVED SHOULD BE DEEMED TO BE SEPARATE AND APART FROM OTHER BUSINESS OF RICHFIELD WITH, AND ITS FINANCIAL OBLIGATIONS TO APPELLANT, CONSTITUTED SUCH DRAFTS AND PROCEEDS A SPECIAL FUND AND DEPOSIT AS AGAINST WHICH NO BANKER'S LIEN OR RIGHT OF SET-OFF EXISTED.

We are firmly convinced that in the preceding pages of this brief we have established the existence of the agreement testified to by Hall and Pope, and confirmed by Lipman, the latter being the President and chief executive of appellant. In this connection we also pointed out that at the time of the agreement an unsecured indebtedness was owed by Richfield Company to appellant in the sum of $625,000, and considering the necessities of the Richfield Company, it would have been extremely improbable that the latter's officials would deliberately entrust to the appellant for collection a large number of drafts, knowing that at any instant thereafter appellant could exercise its banker's lien or right of set-off and prevent the Richfield Company from obtaining possession of funds constantly required to permit its continuance in business. That such agreement, if established, converted the collections, excepting those deposited under the acceptance agreements, into a special fund or deposit upon which appellant could not exercise a banker's lien or right of set-off, has been frequently determined not only by the courts of this and other states, but likewise by Federal tribunals. In referring to the

law applicable to the point under consideration, for the convenience of the court we will classify the authorities under separate sub-titles.

A. Where securities are in a bank's hands under circumstances indicating a particular mode of dealing inconsistent with the bank's general lien, the bank has no lien thereon, and such lien cannot be exercised because the deposits were not made in the ordinary course of business.

In

7 *Corpus Juris,* Sec. 358, page 660,

the rule is thus stated:

> "Deposit for Specific Purpose: The general lien of a bank upon a customer's deposits will not be recognized where the circumstances are inconsistent therewith and accordingly where moneys or securities are deposited with the bank for a particular purpose as to pay or secure a particular loan or debt, they cannot be retained by the bank for a general balance or for the payment of all other claims. * * *"

In

Reynes v. Dumont, 130 U. S. 355; 32 L. ed. 934,

it was held:

> "A general lien in favor of a bank or banker may be implied from the usage of the business, but it does not arise upon securities accidentally in possession of the bank or not in its possession in the course of its business as such, *nor where the securities are in its hands under circum-*

stances or where there is a particular mode of dealing inconsistent with such general lien."

Further held:

"Bond not lodged in the hands of a banker in the ordinary course of banking business, but for a specific purpose and when that purpose was accomplished, permitted to remain for safekeeping, are not subject to a bank's lien for the ultimate debit balance in favor of the bank or against the parties who placed them there."

Chief Justice Fuller, in his decision, states:

"And applying the principles upon which such a lien rests, it is doubtful whether it ever existed in favor of Schuchardt & Sons. Undoubtedly, while a 'general lien for a balance of accounts is founded on custom, and is not favored, and it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between the parties, to establish it,' and 'general liens are looked at with jealousy, because they encroach upon the common law, and disturb the equal distribution of the debtor's estate among his creditors' (2 Kent's Commentaries, *636), yet a general lien does arise in favor of a bank or banker out of contract expressed, or implied from the usage of business, *in the absence of anything to show a contrary intention.* It does not arise upon securities accidentally in the possession of the bank, *or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien."* (Citing cases.)

In

Hanover Nat. Bank etc. v. Suddath, 215 U. S. 110; 54 L. ed. 115,

at page 118 (L. Ed.) it is said:

"The subject was elaborately considered and the authorities were fully reviewed in Reynes v. Dumont, 130 U. S. 354; 32 L. Ed. 934. In that case securities had been sent to bankers for a specific purpose. The purpose having been accomplished the securities were permitted to remain in custody of the bankers as depositaries because they were in a good market and a place convenient for procuring loans and because the expressage upon their return would have been great. The right to a general banker's lien upon the securities was denied. Such a lien it was said would arise 'in favor of a bank or banker out of contract, express or implied, from the usage of the business *in the absence of anything to show a contrary intention.*' Ordinarily it was declared the lien would attach in favor of a bank upon securities and money of the customer deposited in the usual course of business, etc. It was, however, expressly declared not to 'arise upon securities accidentally in the possession of the bank *or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances or where there is a particular mode of dealing inconsistent with such general lien.*' "

In

Ballow v. Farmers Bank etc., 45 S. W. (2d) 882,

it is said:

"There is no doubt about the general rule that when a depositor is indebted to a bank, and the debts are mutual, that is, between the same parties and in the same right, the bank may apply the deposit to the payment of the debt due it by the depositor. However, this rule is subject to the exception that set-off will not be allowed where its natural consequence will be to give the bank a preferential advantage over other creditors, or where it is contrary to the agreement under which the deposit was made, *or where the bank has dealt with the depositor under circumstances inconsistent with the exercise of the right of set-off and having the effect of estopping it from asserting or maintaining the right.*"

Citing,

Union Bank & Trust Co. v. Loble (C. C. A.), 20 F. (2d) 124;

Union Trust Co. v. Peck (C. C. A.), 16 F. (2d) 986;

Merrimack Nat. Bank v. Bailey (C. C. A.), 289 F. 468;

Farmers & Merchants State Bank v. Park (C. C. A.), 209 F. 613;

In re Gans & Klein (D. C.), 14 F. (2d) 116;

In re Cross (D. C.), 119 F. 950;

A leading case upon this subject, decided by the Circuit Court of Appeals of this Circuit, is the case of

Union Bank v. Loble, 20 F. (2d) 124 (C. C. A. 9),

where Judge Gilbert, in confirming the judgment of the court below, said:

"But a bank may so deal with a depositor as to waive or be estopped to assert the right of set-off. Michie, Banks & Banking, 1027. *But the right does not exist where the circumstances are inconsistent with its exercise.* (Citing cases.) *Nor where the principles of legal or equitable set-off do not authorize it.* (Citing cases.)

"While the money realized on the special sale and deposited to the bankrupt's current account and subject to his check for general purposes may not be said to come within the accepted definition of a special deposit so as to be exempt from the bank's claim to the right of set-off *we are inclined to the view that the circumstances under which the fund was created and the cooperation of the bank and the bankrupt in its creation were sufficient to so far impress upon it the character of trust fund that the bank should be held estopped to assert a lien thereon or to the right of set-off.*" Certiorari denied. 72 L. Ed.

B. The understanding between Hall and the officials of the bank, under which the drafts were deposited, gave to such drafts a special or trust character thereby cutting off the right of set-off or right to exercise a banker's lien.

In

Union Trust Co. v. Peck, 16 Fed. (2d) 986,

the principle here invoked is upheld in the following language:

"We are also in agreement with him that the trustee is entitled to recover from the bank the three sums of $5,000, $7,500 and $2,001.02, re-

spectively, subsequently taken from the bankrupt's deposits by the bank. His reasoning on the subject seems to us to be sound. It is, moreover, to be noted that, before and at the time the bank applied these amounts to its own use, it, **the bankrupt and the other creditors were conferring as to the possibility of keeping the bankrupt upon its feet as a going concern** by securing the general acceptance of a scheme of reorganzation which contemplated the creditors taking less than was due them. Under such circumstances the deposit by the bankrupt of large sums in the bank, which both it and the bankrupt intended should be used for the reduction of the former's debt, were obviously **not made in ordinary course, in any fair sense of that phrase.** Most men would feel that **it is an implied term of such negotiations that during their pendency nobody taking part in them shall do anything to secure preferential rights in or over any assets of the bankrupt which did not belong to it when the conferences began,** or upon which it did not then have a prior lien. It follows that so much of the decree below as is challenged by the bank was right, and must be affirmed."

See also:

Union Bank & Trust Co. v. Loble, 20 Fed. (2d) 124,

cited under subdivision (A) hereof.

The decision of the District Court which was affirmed in the case last above cited, is entitled

In re Gans & Klein, 14 Fed. (2d) 116.

In rendering his decision, Judge Bourquin, at page 117, said:

"And the law is well settled (the general law of deposits and trusts) that the trustee, having custody of the deposit, has no right of set-off against the fund, by reason of the depositor's debt to the depository, which can be exercised to the prejudice of the beneficiaries or any one in their right. (Citing cases.) (3) Moreover, the law is equally settled that he who secures possession of property or money, upon his agreement to make certain disposition or application of it, is obligated to perform accordingly or to return the thing to him from whom possession was received. He cannot repudiate his contract, and, in advantage of his wrong, otherwise dispose of the thing to his own benefit. (Citing cases.) (4) By breach of contract a trust cannot be converted to a debt, the title to special deposits cannot be transferred, and set-off against them cannot be had by the defaulting contractor. Essential confidence, fair dealing, and common honesty in business forbid. Libby v. Hopkins, supra."

In

Farmers' & Merchants' State Bank of Waco, Tex., v. Park, 209 Fed. 613 (C. C. A.),

the court stated the proposition as follows:

"Under the evidence in the case, the deposit made by the Slayden-Kirksey Woolen Mill with the appellant bank shortly prior to the bankruptcy was a *special deposit* agreed not to be subject to general set-off. To allow a set-off of the same against the indebtedness previously due the bank would be to give the bank an advantage not enjoyed by other creditors."

C. **While the bank has the right to appropriate money or property in its possession to the extinguishment of a matured debt, it cannot do so if such fund with the knowledge of the bank is charged with the subservience of a special burden or purpose, or constitutes a trust fund.**

American Surety Co. v. Bank of Italy, 63 Cal. App. 149.

Held:

"A bank has a lien upon and so is vested with the right to appropriate any money or property in its possession belonging to a customer to the extinguishment of any matured indebtedness of such customer to the bank to the full extent of the money or property so possessed, if necessary, and so far as it may go towards such extinguishment, provided, of course, that such property or money so deposited *has not been charged, with the knowledge of the bank, with the subserviance of a special burden or purpose, or does not constitute a trust fund, of which the bank had notice.*"

Further held:

"Such banker's lien ordinarily attaches in favor of the bank upon the securities and funds of a customer *deposited in the usual course of business* for advances supposed to have been made upon their credit, not only against the depositor but against the unknown equities of all others in interest, *unless modified or waived by some agreement, express or implied, or conduct incon-*

sistent with its assertion; but no such lien would prevail against the equity of a beneficial owner of which the bank had notice either actual or constructive."

The judgment in this case was reversed, but in the last paragraph of the decision the following is stated:

"Counsel asked this court, if a reversal of the judgment be ordered, to order the court below to enter judgment upon its findings and the agreed statement of facts for and in favor of the defendant. This, we think, we should not do. *Upon a retrial a different set of facts might be shown* on the question of notice to the bank or of an agreement between the latter and Ernest Green *that the account in question was opened for the use and benefit of a special purpose.*"

In

7 *Corpus Juris,* sec. 358, page 660,

it is stated:

"Deposit for Specific Purpose: The general lien of a bank upon a customer's deposits will not be recognized *where the circumstances are inconsistent therewith* and accordingly where moneys or securities are deposited with the bank for a particular purpose as to pay or secure a particular loan or debt, they cannot be retained by the bank for a general balance or for the payment of all other claims. * * *"

In

7 *Corpus Juris,* sec. 358½, page 660,

it is stated:

"Deposit Affected with Trust: It has been considered that where a deposit is impressed with a trust the bank cannot retain it on the doctrine of equitable set-off."

See

United States v. Butterworth-Judson Corp., 267 U. S. 387; 69 L. Ed. 672.

In re Davis, 119 Fed. 950,

it is said at page 955:

"While a general deposit by a merchant of money in a bank creates the relation of debtor and creditor, and authorizes the bank to use the money as its own, such result does not obtain when the deposit is made for a special purpose, *as for example, to be paid to creditors, as was the case here.* In the latter case a fiduciary relationship is created, and the money is held in a trust fund, not as bank assets, and hence, the bank is without lawful right to appropriate it to its own use. (Citing cases.)

In Wilson v. Dawson, 52 Ind. 515, the court stated the principle in the following language: 'It is a general rule that funds deposited in a bank *for a special purpose* known to the bank cannot be withheld from that purpose to the end that they may be set off by the bank against a debt due to it from the depositor. *The claim of a general lien by the bank would be inconsistent with its special undertaking.* (Citing Morse, Banks and Banking, 34 et seq., and authorities cited; Bank v. McAlester, 9 Pa. 475.)"

In

Wagner v. Citizens Bank, 122 S. W. (Tenn.) 245; 28 L. R. A. (New Series) 484,

the court states:

"A bank which, through its president as one of the creditors of a manufacturing company, has agreed with it and the other creditors that the assets of the company shall be collected and deposited in the bank to be divided among all creditors prorata, cannot upon the institution of bankruptcy proceedings against the corporation set off the fund so accumulated against its own claim *since the fund is a trust deposit for specific purposes created with the knowledge and consent of the bank,* and it cannot for the purposes of setoff treat it as the individual property of the corporation."

* * * * * * *

"We are of the opinion that these authorities are applicable in the present instance. It distinctly appears on this record that the funds accumulated in the defendant bank were deposited for a special purpose with the knowledge and consent of the president of the bank; that the funds could not be checked out by the president of the furniture company without the signature of J. L. Morrison, representative of the creditors' committee. *The fund thereby became a trust deposit for specific purposes with the knowledge and consent of the bank and the latter had no right of setoff in said fund against the bankrupt's indebtedness to the bank."*

XV.

THE ACTION OF THE OTHER BANKS IN RESTORING TO THE RECEIVER THE CASH BALANCES AND CREDITS OF THE RICHFIELD COMPANY IN THEIR POSSESSION, AND IN FAILING TO EXERCISE THEIR BANKERS' LIENS IN CONSIDERATION OF THE AGREEMENT OF APPELLANT TO DO LIKEWISE, CREATED AN ESTOPPEL AGAINST APPELLANT EFFECTUALLY PREVENTING IT FROM THEREAFTER EXERCISING ITS BANKER'S LIEN UPON BALANCES AND CREDITS IN ITS POSSESSION AT THE TIME OF SUCH AGREEMENT.

In

Union Bank & Trust Co. v. Loble, 14 Fed. (2d) 116,

the plaintiff, with certain other creditors—prior to insolvency—agreed to refrain from pressing their claims to the end that the business might continue and certain eastern creditors paid and that eventually they too would be paid. This agreement was so far executed that the business continued approximately five or six weeks during which the bank honored all checks of the bankrupt and paid out approximately $4700 but not to eastern creditors as it had agreed to do. On January 25th, the date of adjudication, the bank had on hand $8300, which it applied to the bankrupt's note to the bank. The District Court said:

> "Special or specific deposits do not create the relation of debtor and creditor, but are in the nature of a trust. The special contract by virtue of which the bank receives them is inconsistent with and avoids the otherwise right of lien and set-off implied in the ordinary contract of deposits. * * * In so far as some thereof (deposits) were paid for current expenses and other accounts, it was implied from the beginning, or

was a more or less necessary modification by conduct from time to time, to execute the agreement and to continue the plan. * * * Moreover, the law is equally well settled that he who secured possession of property or money upon his agreement to make certain disposition or application of it, is obligated to perform accordingly or to return the thing to him from whom possession is received. He cannot repudiate his contract, and in advantage of his wrong, otherwise dispose of the thing to his own benefit." (Hanover Bank v. Suddath; Smith v. Sanborn State Bank, 126 N. W. 779.)

In affirming the case, *Union Bank & Trust Co. v. Loble,* 20 Fed. (2d) 124, Judge Gilbert, writing the decision for C. C. A., held that there was no fraudulent preference.

"**But a bank may so deal with a depositor as to waive or be estopped to assert the right of setoff.** Michie, Banks and Banking, 1027. **And the right does not exist where the circumstances are inconsistent with its exercise.** (Citing cases.) Nor where the principles of legal or equitable setoff do not authorize it. (Citing cases.) On these grounds we think the decision of the court below is sustainable. While the money realized on the special sale and deposited to bankrupt's current account and subject to its check for general purposes may not be said to come within the accepted definition of a special deposit so as to be exempt from the bank's claim to the right of setoff, **we are inclined to the view that the circumstances under which the fund was created, and the cooperation of the bank and the bankrupt in its creation, were sufficient to so far impress**

upon it the character of trust fund that the bank should be held estopped to assert a lien thereon or the right of setoff. (Quoting from 16 F. (2d) 986, as follows:) 'It is moreover to be noted that, before and at the time the bank applied these amounts to its own use, it, the bankrupt, and the other creditors were conferring as to the possibility of keeping the bankrupt upon its feet as a going concern by securing the general acceptance of a scheme of reorganization which contemplated the creditors taking less than was due them. Under such circumstances the deposit by the bankrupt of large sums in the bank, which both it and the bankrupt intended should be used for the reduction of the former's debt, were obviously not made in ordinary course, in any fair sense of the phrase."

In

Ballow v. Farmers Bank etc., 45 S. W. (2d) 882,

where the facts are quite comparable to those in the instant case, the court said:

"There is no doubt about the general rule that when a depositor is indebted to a bank, and the debts are mutual, that is, between the same parties and in the same, the bank may apply the deposit to the payment of the debt due it by the depositor. However, the rule is subject to the exception that set-off will not be allowed where its natural consequence will be to give the bank a preferential advantage over other creditors, or where it is contrary to the agreement under which the deposit was made, *or where the bank has dealt with the depositor under circumstances in-*

consistent with the exercise of the right of set-off and having the effect of estopping it from asserting or maintaining the right. (Citing many cases.)
* * *

"In other words, defendant fully understood that the funds deposited with it to the account of the trustee were derived solely from the attempted liquidation of Hopper's business; that they were to be used in payment of the claims of his creditors; and that they came into Thomas' hands, and thence into the custody of the bank, impressed with a trust for a specific purpose. It knew as well as any one that the deposits, though they represented sums realized from the sale of Hopper's assets, were nevertheless not made in the usual and ordinary course of Hopper's business, for the usual and ordinary course of Hopper's business ceased when Thomas took charge of it under the scheme for liquidation. The deposit of the trust funds pursuant to such scheme created no relation of debtor and creditor between the bank and Hopper, but rather between the bank and the trustee; and any termination or relinquishment of his trusteeship by Thomas did not serve to change the original character of the deposits.

A case largely on all fours with the one at bar is to be found in the decision of the Supreme Court of Arkansas, in Wimberley v. Bank of Portia, 158 Ark. 413, 250 S. W. 334, 335, from which we quote as follows:

'It is a general rule that funds deposited in the bank for a special purpose known to the bank cannot be withheld from that purpose to the end that they may be set off by the bank against

a debt due it from the depositor. In other words, while it is true that a general deposit by a merchant of money in a bank creates the relation of debtor and creditor and authorizes the bank to use the money as its own, *such result does not obtain when the deposit is made for a special purpose; as, for example, to be paid to creditors.* * * *

'Tested by this rule, we think that the learned chancellor erred in finding in favor of the defendant in this case. * * * A preponderance of the evidence shows that the money was deposited in a bank by A. L. Pickens as a trust fund to be used by Z. C. Wimberley as his trustee in paying off all of his creditors pro rata. * * *' ''

See also:

Merrimack v. Bailey, 289 Fed. 468;

In re Gans & Klein, 14 Fed. (2d) 116 (9th Cir.).

XVI.

THE CIRCUMSTANCES OF THE AGREEMENT ENTERED INTO BETWEEN THE BANKS RESPECTING RESTORATION OF BALANCES TO ENABLE THE RICHFIELD COMPANY TO CONTINUE IN BUSINESS AND AVOID BANKRUPTCY ARE INCONSISTENT WITH THE RIGHT OF THE BANK TO EXERCISE ITS BANKER'S LIEN OR RIGHT OF SET-OFF.

In *Union Bank etc. v. Loble,* 20 Fed. (2d) 124 (9th Circuit, C. C. A.) it was held that

> "Where a bank, with the knowledge of the bankrupt's failing circumstances, suggested that bankrupt conduct a special sale to raise money to pay certain creditors with a view to reorganizing and continuing the business, the fund realized on such sale and deposited in the bank, held impressed with character of a trust fund so as to exempt it from bank's claim to right of set-off against debt owing it from bankrupt."

Union Trust Co. v. Peck, 16 Fed. (2d) 986 (C. C. A.)

> "It is, moreover, to be noted that before and at the time the bank applied these amounts to its own use, it, the bankrupt and the other creditors were conferring as to the possibility of keeping the bankrupt upon its feet as a going concern by securing the general acceptance of a scheme of reorganization which contemplated the creditors taking less than was due them. Under such circumstances the deposit by the bankrupt of large sums in the bank which both it and the bankrupt intended should be used for the reduction of the former's debt were obviously not made in the ordinary course in any fair sense of that phrase. Most men would feel that it is an implied term of such negotiation that during their pendency

nobody taking part in them shall do anything to secure preferential rights in or over any assets of the bankrupt which did not belong to it when the conferences began, or upon which it did not then have a prior lien."

Ballow v. Farmers Bank, 45 S. W. (2d) 882.

"The general rule is subject to the exception that set-off will not be allowed where its natural consequences will be to give the bank a preferential advantage over other creditors or where it is contrary to the agreement under which the deposit was made, or where the bank has dealt with the depositor under circumstances inconsistent with the exercise of the right of set-off and having the effect of estopping it from asserting or maintaining the right." (Citing cases.)

XVII.

APPELLANT'S CLAIM THAT THE EVIDENCE INTRODUCED IN THE LOWER COURT WAS LEGALLY INEFFECTIVE TO ESTABLISH A WAIVER OF ITS BANKER'S LIEN AND RIGHT OF SET-OFF IS LACKING IN MERIT, AND THE AUTHORITIES RELIED UPON FAIL TO SUSTAIN ITS POSITION.

The sufficiency of the evidence to sustain the findings of the lower court, as well as the legal effect of the court's determination, has already received attention in the preceding pages of this brief. We believe it proper, however, to briefly comment on some of the contentions advanced by appellant under this title, and to refer to a very few of the authorities upon which it relies.

A. Status of drafts deposited under acceptance agreements.

Appellee concedes that if the drafts here involved were not deposited under the acceptance agreement, but in the ordinary course of business, and in the absence of any special agreement or the waiver of January 16, 1931, appellant would be entitled to subject such drafts and their proceeds to its statutory banker's lien, or its contractual right of set-off. The authorities cited by appellant undoubtedly support this concession. It is not and never has been challenged by appellee.

But if the drafts here in controversy were not deposited under the acceptance agreement and the decision of the lower court with respect to the so-called Hall agreement is sustained by the evidence, and it has the legal effect imputed to it by appellee, OR if the evidence is sufficient to support the determination

of the lower court that by its agreement of January 16, 1931, appellant waived its banker's lien, as well as its right of set-off as to all drafts and their proceeds, excepting those placed under the acceptance agreement, then undoubtedly its banker's lien and right of set-off which it otherwise could have exercised, no longer existed, and its claim to the drafts here involved and their proceeds, is lacking in foundation.

B. Authorities cited by appellant and its criticism of authorities relied on by appellee.

In its brief appellant undertakes to analyze some of the authorities cited by appellee in the court below in support of its claim that by the so-called Hall agreement, as well as by the agreement of January 16, 1931, appellant's banker's lien and right of set-off as to the long term drafts were waived. We will not attempt to comment upon such analysis because many of the decisions are herein set forth and speak for themselves. These cases enunciate a rule given universal recognition which, applied to the proven facts in this case, conclusively clothes the drafts herein involved and their proceeds with the status which effectively prevents appellant from exercising thereon any alleged banker's lien or right of set-off. They apply with equal force to the agreement of January 16, 1931, entered into between the receiver and appellant, to which reference has already and will hereafter be made. The decisions cited in support of appellant's contention are not out of harmony with those cited by appellee.

While, in the absence of any special agreement or circumstances exempting the deposited funds from the statutory lien privileges enjoyed by bankers, the cases hold that such privileges are properly enforceable, they specifically point out that when it has been established, either by an express agreement or by attending circumstances, that the deposit was not made in the ordinary course of business or was charged with the subservience of a special burden or purpose, or constitutes a trust fund, that the right to banker's lien or right of set-off no longer exists.

In

Goodwin v. Barre Trust Co., 100 Atl. 34, cited by appellant (p. 78), in holding that a motion for a directed verdict was properly overruled, the court said:

> "But the plaintiff's evidence tended to show that it was expressly agreed that the defendant would not keep the money but would turn it over to the bankrupt. Mr. Cutler testified that he told Mr. Drew, when the latter came to him and asked to have the two drafts here in question turned over to the defendant for collection to save expense, that he did not want to do it because he *'was afraid the bank would gobble all the money'* and he wanted it to pay to the other creditors; and that Mr. Drew assured him that the bank would not keep the money but would turn it over to him. **Here, then, was an express agreement not to assert a lien. Against such an agreement a lien would not stand. A banker's lien does not apply when there is a contract, expressed or implied, inconsistent with such lien.** (Citing 1 Jones on Liens, sec. 244.) **The lien does**

> not apply when the circumstances or a particular mode of dealing are inconsistent with such lien." (Citing cases.)

The case of

Minard v. Watts, 186 Fed. 245,

cited by appellant (pp. 97 and 98), is not in point because it was there stipulated by the parties as follows:

> "that there was not at any time any express agreement or understanding between Henry Minard or the Garrett Biblical Institute, or either of them, on the one part and the First National Bank on the other part, **that the deposits or any of them referred to in the bill of complaint in this case were to be held or kept separate and distinct from the general funds of the bank.**"

It was because of this stipulation that the court said:

> "Therefore the transaction here involved, being one of deposit, the legal status of the parties thus created must be either that of bailor or bailee or of creditor or debtor, for no other legal relation can arise out of the act of one depositing money with a bank."

The court therefore concluded:

> "As it is stipulated by the parties that there was *no express agreement or understanding* between the parties in this case *that the deposit made should be considered as special, and as there was nothing in the character of the transaction had in this case from which there may be found an implied agreement or understanding between the parties to that effect,* it must be held that the deposits were made general and not special."

In

Joyce v. Auten, 179 U. S. 591,

(cited by appellant, p. 78), the court said:

> "It is a familiar law that a bank receiving notes for collection is entitled **in the absence of a contract, express or implied to the contrary** to retain them as security for the debt of the party depositing the notes." (Citing cases.)

In

Garrison v. Union Trust Co., 102 N. W. 978,

(cited by appellant, p. 78) the court quoted the following language with approval:

> "A banker has a lien on all securities of his debtor for the general balance of his account **unless such lien is inconsistent with the actual or presumed intention of the parties.**"

One of the two principal cases quoted by appellant directly sustains the contention of appellee. The other case is not in point. This becomes readily apparent from an examination of these decisions.

In

American Surety Co. v. Bank of Italy, 63 Cal. App. 149 (supra, p. 147),

the question involved was whether a certain deposit constituted a trust fund. Ernest Green, a building contractor, received moneys from the owner of a garage under construction to be used by him in paying the claims of laborers and materialmen. He deposited this fund in a bank with which he had been doing business under the following designation, "Ernest Green, Silva Garage". The lower court held that the fund was a trust fund. The appellate court,

however, held that the evidence was insufficient to show that Green had entered into any agreement with the bank respecting such deposit, or that the bank knew the purpose for which the deposit had been created. The decision, however, recognizes that under evidence such as is found in the record in the case at bar, appellant would not be authorized to exercise its banker's lien or right of set-off upon funds deposited pursuant to such agreement. This is clearly shown by the following language found at page 157 of the decision:

> "Such an agreement as the plaintiff claims the evidence shows was made between Green and the bank as to the account in dispute, while creating in a sense a trust relation between the bank and Green as to said account would, strictly, involve merely an agreement on the part of the bank to waive its right to appropriate the moneys deposited in the account as a setoff to any indebtedness of the depositor to it—that is, it would amount only to a waiver of its right of lien. But, be that as it may, no express agreement or understanding between the bank and Ernest Green that the moneys in question were to be used for or appropriated to the payment of the claims of such persons as furnished materials for use in the construction of the Silva Garage and of mechanics and laborers who bestowed labor on said building is shown by the evidence. **Nor is there any direct evidence that Green gave the bank instructions to the effect that the moneys deposited in said account were to be appropriated or applied to a special purpose.** If then there was such agreement or direction to the bank by Green of the asserted special purpose of said account,

> it must be extracted from the circumstances under which the account was opened and made."

And after showing that no such circumstance was reflected by the evidence, the decision proceeds:

> "It is true that the court found that the account in question was marked or designated as indicated upon the suggestion of the officials of the defendant. But that finding derives no direct support from the evidence. There is testimony showing that the 'Milliken' bridge account was so designated on the suggestion of an officer of the defendant, **but there is no testimony, nor does such fact appear in the statement of the stipulated facts, that the 'ear marking' of the account involved herein was suggested by any officer of the bank.**"

That part of the decision in which the court says:

> "A banker is not required to go 'snooping' about to learn from what source his depositors obtain the moneys which they deposit in his bank"

quoted by appellant in its brief is directed to the proposition that the bank was put upon inquiry as to the source from which Green obtained the moneys deposited in said account by the fact that the account was designated "Ernest Green, Silva Garage". In the concluding paragraph of the opinion, however, the court clearly makes manifest that if the facts were as indicated by the record here the judgment of the lower court would have been affirmed. There it is said (p. 163):

> "Counsel ask this court, if a reversal of the judgment herein be ordered, to order the court

> below to enter judgment upon its findings and the agreed statement of facts for and in favor of the defendant. This we think we should not do. Upon a retrial a different state of facts might be shown upon the question of notice to the bank **or of an agreement between the latter and Ernest Green that the account in question was opened for the use and benefit of a special purpose.''**

An examination of the case of

Updyke v. Oakland Motor Car. Co., 53 F. (2d) 369,

(the remaining case referred to) will quickly disclose that it is not in point.

There it was claimed that the Oakland Motor Car Company had by an agreement waived its right of set-off. In holding that the proof failed to measure up to the claim the court said:

> "But Stratton never claimed that Oakland, in terms, promised not to exercise the right of set-off or that the payment was to be *a special deposit in Stratton's favor* or was to be applied by Oakland in some specific way."

It must be apparent that the facts in case just cited are not at all comparable to those proven in the case under discussion. At the time the agreement between Hall and the bank was made the Richfield Company was indebted to the bank in the sum of $625,000 which was to shortly mature. It was to satisfy this very indebtedness that the appellant herein exercised its banker's lien and right of set-off. It was because of this indebtedness, as well as to prevent the foreign collections being utilized in its payment, that Hall

insisted that the agreement testified to by Hall and Pope be made. That the agreement was in fact made was proven not only by Hall and Pope, but by Lipman and Hellman. If the agreement was in fact made, its only purpose was to prevent the doing of the acts which are here complained of. If the foreign drafts were deposited pursuant to the so-called Hall agreement, under the authorities heretofore cited by appellee, they were not deposited in the "ordinary course of business" and therefore constituted a special or trust deposit which was not subject to the exercise of any banker's lien or right of set-off. Most certainly the circumstances proven indicated a particular mode of dealing which was inconsistent with the existence or the exercise of a banker's lien, or right of set-off, and which under the authorities hereinbefore cited, estopped appellant from asserting or maintaining such claimed right.

C. Mechanics' liens not comparable to bankers' liens.

We do not believe it at all essential to engage in a discussion respecting the analogy between the present case and cases involving a waiver of mechanics' liens. In each of the cases cited by appellant the work for which the lien was claimed was done in conformity with a written contract in which was made no mention of the alleged waiver of lien. In holding that no waiver was shown, considerable reliance was had upon the terms of the written agreement and the circumstance that the waiver attempted to be shown was inconsistent with its language. The cases cited either hold that the waiver could not be shown be-

cause inconsistent with the language of the agreement, or that in view of the language of the agreement the alleged waiver had to be established by clear and convincing evidence.

In the instant case it is not claimed that the so-called Hall agreement in any way affected the collections deposited as security under the acceptance agreement. The contention is that it related and applied only to those drafts which were not deposited under such acceptance agreement. Therefore, the rule declared in the so-called mechanics' lien cases is without application.

D. The transmission of proceeds to receiver.

Under this heading it is asserted that appellee seeks to aid his case for waiver by relying on the act of appellant in crediting to the account of the receiver proceeds of drafts previously deposited with appellant.

In support of this statement it cites the case of *Bell v. Hutchison Lbr. Co.,* 145 S. E. 160, in which it is held that the application of certain funds to other indebtedness of a corporation does not amount to a waiver or abandonment of a lien. Apparently counsel for appellant fail to appreciate the force or effect of the evidence referred to by them or the claim made by appellee with respect to such evidence. It is not contended that the mere crediting of these funds to the account of the receiver in and of itself constituted a waiver. The claim is that the conduct of appellant in voluntarily and without request de-

positing to the credit of the receiver the proceeds of drafts which appellant now claims were deposited under the acceptance agreement and, therefore, subject to its provisions which, in the absence of such waiver, could be offset to satisfy in part the indebtedness due to it, is convincing evidence, *first,* that the drafts were not deposited under the acceptance agreement; and, *secondly,* that appellant had, as a matter of fact, by its agreement of January 16, 1931, waived any statutory or contractual lien that it might theretofore have had upon said drafts or proceeds. In other words, it was conduct consistent only with the claims advanced by appellee and entirely inconsistent and at variance with the defense which it now asserts.

XVIII.

APPELLANT'S CLAIM THAT THERE WAS NO CONSIDERATION FOR A WAIVER OF LIEN BY APPELLANT AFTER THE APPOINTMENT OF THE RECEIVER.

The claim made by appellant that there was no consideration for the agreement of January 16, 1931, is based upon a misconception of the status of the receiver and the effect of his appointment.

When a receiver is appointed for a corporation, to the extent to which the order appointing him confers upon him power and authority, he stands in the shoes of the corporation and acts as the representative not only of the court but of the corporation, its creditors and stockholders. While the effect of the appointment of an equitable receiver for a corporation is not comparable to the latter's dissolution, nevertheless to the extent to which the receiver is empowered to act, the functions of the corporation cease.

When a receiver is appointed to take possession of all property and assets of a corporation and to carry on its business, and is further authorized to institute such litigation as may be necessary to enforce the provisions of the order and to collect all outstanding claims, and an injunction is issued restraining interference with his powers by the corporation, its agents and all other persons, in performing the duties and obligations thus imposed upon him, he occupies the position previously occupied by the corporation. While he takes its property and assets subject to all outstanding liens and claims, he is clothed with the power of asserting and enforcing all rights that at the time of his appointment were pos-

sessed by the corporation. In carrying on its business he possesses the same power that would have been possessed by the corporation had the receivership not occurred, and, where authorized, he has the right to enter into such contracts as in his judgment may be necessary to carry on and conduct the business entrusted to his care.

It is obvious, therefore, that McDuffie's authority extended to the making of the agreement of January 16, 1931, and we are thus brought to the proposition as to whether such agreement was based upon a valid consideration. The receivership was initiated to enable the business of the Richfield Oil Company to be carried forward and to avoid bankruptcy. The agreement on the part of appellee to continue as such receiver and to carry on the business of the company and thus avoid its bankruptcy, itself would be a sufficient consideration for making the agreement claimed. But it is a well-recognized principle of law that any consideration received by a person making an agreement, even though such consideration did not emanate from the other party to the agreement, is itself sufficient in law to support the agreement. This is made manifest by Section 1605 of the *Civil Code* (Cal.) which provides:

> "Any benefit conferred or agreed to be conferred upon the promisor by *any other person* to which the promisor is not lawfully entitled, or any *prejudice* suffered or agreed to be suffered *by such person* other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promisor, is a good consideration for a promise."

The evidence without dispute shows that in consideration of appellant's agreement of January 16, 1931, certain other bank creditors restored cash balances to Richfield which had already been offset, and agreed not to exercise their right of offset as against cash balances not already interfered with. The evidence further proved that in reliance upon said agreement of appellant, the Security Bank not only restored the cash balances of the Richfield Company already offset by it, but subsequently turned over to the receiver collections aggregating $152,000 upon which it had the legal right to exercise its banker's lien and right of set-off.

While appellant, being a creditor of Richfield and interested in its efforts to avoid bankruptcy, benefited by what the other banks did, this element is not important because the other bank creditors actually *suffered a prejudice* to the extent of the moneys relinquished by them to Richfield Company in consideration of the agreement made by appellant.

Further discussion of this matter we deem nonessential.

XIX.

APPELLANT'S CLAIM THAT ESTOPPEL CAN BE RELIED ON ONLY BY A PARTY TO THE ACTION.

Having demonstrated that the agreement of January 16, 1931, was based upon a good and enforceable consideration, the question of estoppel becomes one of no particular moment. If, however, the court is of the opinion that the element of estoppel is at all important, the proven facts in this case have established an estoppel against appellant which would prevent it from successfully asserting that the agreement was unenforceable because of want of consideration.

The agreement of January 16, 1931, in legal effect is a tri-party agreement. It was made immediately following the date of the appointment and qualification of the receiver. It was an agreement which, as we have already shown, under his order of appointment the receiver had a right to make. It was made by the receiver in his representative capacity for and on behalf of the corporation whose assets, property and business he represented, as well as the creditors and stockholders interested therein. But aside from these facts, while it was directly made between the receiver and appellant, it also involved the agreements of the various bank creditors, which latter agreements depended upon the agreement of the appellant. Under these circumstances the bank creditors were not only beneficiaries of the agreement, but in legal effect, were parties thereto.

It appears in evidence without dispute that in consideration of and in reliance upon the appellant's agreement, the receiver remained in his position and

continued to carry on the business of the Richfield Company. It also appears without dispute that in consideration of and in reliance upon the agreement with appellant, the other bank creditors actually performed the things agreed to by them which, as to the Security Bank, included the payment to the receiver of the proceeds of the collections theretofore deposited with it upon which, in the absence of the agreement, it could—and probably would—have exercised a banker's lien and right of set-off.

Assuming that any doubt could possibly exist with respect to consideration, an estoppel *in pais* has been demonstrated which effectually prevents appellant from successfully asserting any such defense.

Seymour v. Oelrichs, 156 Cal. 782 at 794.

The principle that

> "estoppels operate only between parties and privies and the party who represents an estoppel must be one who has in good faith been misled to his injury"

may be conceded. The facts herein involved and proven by the evidence, as above pointed out, bring this case within the principle stated. Not a scintilla of evidence was introduced which would justify the assumption that either the receiver or the bank creditors would have acted as they did except for the belief that the agreement of January 16, 1931, was a valid agreement and that appellant was equally bound with them to measure up to its requirements and perform the obligations with which they were all burdened.

That the receiver, as such, is not entitled to enforce this estoppel is equally untenable.

If, as already pointed out, the receiver, for the purposes of this litigation, represents the corporation as well as those interested therein including its creditors, then necessarily he is clothed with all of the rights that could have been asserted and enforced by the corporation if the action had been instituted by the corporation. There can be no question but that after his appointment the corporation itself could not institute or maintain this action. There is likewise no doubt but that after his appointment, considering the terms and provisions of the order appointing him, he and he alone could institute and maintain this action. It is equally free from doubt that the pending action was in fact brought by the receiver in a representative capacity for and on behalf of the corporation and those interested therein. This agreement, although made with the receiver, was in fact entered into by him on behalf of the corporation. It seems futile, therefore, for appellant to argue that under such circumstances the rights possessed by the corporation and the remedies available to it cannot be asserted and pursued by the receiver, the only person authorized to institute and maintain the action.

That the status of the receiver is as has been indicated is clearly shown by the authorities. In

Westinghouse etc. v. Binghampton R. Co., 255 Fed. 378, at 385,

it is said:

> "A receivership is for the benefit and protection of all interests, general creditors, secured creditors (bondholders) and stockholders, and it is the duty of the court, so far as reasonably possible, to conserve and protect all interests."

In

53 *C. J.*, Sec. 163, page 137,

the rule is thus stated:

> "So the acts of a receiver are the acts of the court for which he acts, *and, his appointment being for the benefit of all parties interested,* he holds and manages the property for the benefit of those ultimately entitled, and not primarily for the benefit of the party at whose instance the appointment was made."

And in describing the capacity in which a receiver acts in instituting and prosecuting an action, at

53 *C. J.*, Sec. 537, page 324,

with reference to the status of a receiver in the prosecution of an action, it is stated:

> "The general rule is that a receiver takes the rights, causes and remedies which were in the corporation, individual or estate whose receiver he is, or which were available to those whose interests he was appointed to represent. Where a claim asserted by or against a receiver affects the interests of all the parties in the property alike, the receiver is the proper party to bring or defend the action, *and a receiver representing all the parties to a subscription to a common purpose may maintain an action against one of the persons so represented for a sum due from that one to the whole body represented, although defendant may be ultimately entitled to a share of the proceeds of such suit.* And, subject to some qualifications and exceptions, especially provided for by statute or the rules of equity authorizing a receiver to sue in the interests of creditors, he stands in the shoes of such person or estate and can enforce only such rights and contracts, or maintain only

> such action or defense as could be enforced or maintained by any such person or estate."

A multitude of cases from many jurisdictions, both federal and state, could be cited in support of these principles, but we deem such citation unnecessary. An examination of the cases cited by appellant to this point will show that to no extent whatever does any of them qualify the legal principles above set forth.

XX.

THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY REGARDING THE MEETINGS OF THE RICHFIELD BANK CREDITORS AND THE COMMUNICATIONS PASSING BETWEEN SUCH CREDITORS AND THE RECEIVER.

It is claimed by appellant that the lower court erred in admitting in evidence the discussion which occurred between Mr. McDuffie, receiver of the Richfield Company, and its bank creditors at the meeting which followed the appointment of the receiver. The appointment was made on January 15, 1931, and the meeting to which reference is made occurred the following day, January 16, 1931. In its brief appellant states that Mr. McDuffie and Mr. Nolan were allowed to testify over the objection of appellant as to what was said at both of said meetings. (p. 165.) In this, however, appellant is mistaken. With respect to the meeting held on January 14, 1931, the evidence merely disclosed the holding of the meeting and the persons present. No inquiry was made respecting what was said at such meeting. (R. 205.) In this connection it might be proper to state that the meetings preceding the one on January 16, 1931, were participated in by the banker creditors to whom there was due in excess of ten million dollars, evidently for the purpose of bringing about the receivership. According to the testimony of Mr. Nolan

> "These meetings were held in connection with the outstanding indebtedness for the purpose of protecting banks and the bank's depositors. I recall that Mr. Eisenbach was present at one of these meetings. The bankers were very much concerned about Richfield." (R. 239.)

Over appellant's objection, however, the court did admit evidence disclosing what occurred at the meeting held on January 16, 1931, as well as the telegrams subsequently passing between the creditor banks and the receiver. This evidence, however, was admitted for the limited purpose

> "of establishing a waiver and estoppel against defendant with respect to its subsequent right to exercise its alleged banker's lien and right of set-off and conceded that said testimony would not be binding on defendant except to the extent to which information was afterwards communicated to defendant respecting what occurred at said bankers' meetings." (R. 240.)

The court will recall that the proposed receivership was to protect and conserve the assets of Richfield and enable the receiver to carry on its business for the benefit of its creditors, among others, its banker creditors. That at the meeting last above referred to the receiver insisted that if he was to remain in that capacity and conduct the receivership, all of the bank creditors would have to agree that the funds and credits in their possession belonging to the Richfield Company should be available to the receiver and that those that had exercised their banker's lien or right of set-off as against such credits and deposits should forthwith restore them and the remaining banks should agree not to exercise such right; otherwise the receiver would retire and the company would become bankrupt.

During the course of the meeting and after the receiver had stated its purpose, as well as his attitude in the matter, the bank creditors who were present

agreed to comply with the receiver's requirements, provided compliance therewith was agreed to by all other bank creditors. Thereupon the receiver's telegram of January 16, 1931 (Plff's. Ex. 2), was prepared by a committee of the bankers present and transmitted to each of the banker creditors. Thereupon Mr. Nolan, at the request of Mr. McDuffie, telephoned appellant and communicated to Mr. Eisenbach, its vice-president, one of its executives and chief credit man, the substance of what had occurred at the meeting. (R. 243.) Appellant thereupon prepared and transmitted to the receiver its telegram in response, also dated January 16, 1931. (Plff's. Ex. 3.) Each of the remaining bank creditors likewise responded by wire or communication to the telegram of the receiver acquiescing in his requirements upon the understanding that all other banks would do likewise.

It can readily be understood that this evidence was not only important, but essential to establish

(a) Consideration for the agreement of appellant to restore the bank balances of Richfield which had already been offset by it, and its agreement to waive its banker's lien and right of set-off against the collections in its possession other than those supporting the acceptance agreements.

(b) The fact that other banks had agreed to do likewise; otherwise appellant's agreement would not have been effective, and

(c) To establish that the remaining bank creditors of Richfield relied upon the agreement of each other, as well as of appellant, in restoring

bank balances of Richfield and, as to the Security Bank, in waiving its banker's lien and right of set-off against the collections then in its possession.

In the absence of this evidence, limited exclusively to the purposes hereinbefore indicated, appellant might absolve itself from liability upon the asserted grounds that no consideration existed for its agreement and might successfully claim that the necessary elements of estoppel and waiver had not been shown.

Appellant in its brief admits the purposes for which this evidence was offered. (p. 165.) The record is slightly confusing, however, for the reason that in the court below Mr. McDuffie was withdrawn from the stand in order to enable Mr. Nolan to testify. This evidence was first introduced while Mr. Nolan was on the stand. In the statement of evidence, however, the evidence of Mr. McDuffie is reproduced as though he had not been withdrawn. The limited purpose of the evidence is shown in the testimony of Mr. Nolan (R. 240), which according to the record appears to have been given after McDuffie testified, whereas in fact the reverse occurred. The purpose having been stated when the evidence was first offered, no subsequent statement was made or was required. The court's ruling, however, with respect to this evidence was necessarily based upon the limitation placed upon it by appellee.

Even assuming, however, that this evidence was objectionable, no prejudice thereby was suffered by appellant. If the so-called Hall agreement is established, the existence or non-existence of the agreement

of January 16, 1931, becomes immaterial. Furthermore, in the absence of this evidence, consideration for the agreement would be presumed. (California Civil Code, Sec. 1614.) Inasmuch as no evidence was introduced by appellant establishing want of consideration, the determination of the lower court would necessarily have to be in accord with the presumption.

CONCLUSION.

We believe we owe the court an apology for the apparent undue length of this brief. We feel, however, that the extent of our efforts may be justified not alone because of our desire to assist the Court in reviewing the evidence, both oral and documentary, but because of the importance of this litigation to our client and our conviction that if properly presented, the integrity of the determination by the lower court will be readily made manifest.

We cannot help but be convinced that within the pages of this brief we have established (a) that it was definitely understood and agreed that the foreign collections of the Richfield Company, deposited with appellant should be considered entirely separate and apart from all other business transactions between Richfield Company and the bank; (b) that only the short-term drafts, and that none of the so-called long-term drafts, including those involved in this appeal and their proceeds, were deposited as security under the acceptance agreements; (c) that the provisions of the acceptance agreements conferring upon appellant a contractual lien attach or fasten themselves only to the drafts deposited thereunder; and (d) that the agreement of January 16, 1931, was not only supported by an adequate consideration, but by its terms, appellant agreed to waive whatever right it had to exercise any lien, either contractual or statutory, upon any drafts or their proceeds, excepting those deposited as security under said acceptance agreements.

It is respectfully but earnestly submitted that the evidence, both oral and documentary, the equities and

justice of the controversy, the conduct of the parties with respect to the matters herein involved, the statutory law of this state and the adjudication of appellate tribunals require that the judgment of the court below should be affirmed.

Dated, San Francisco,
April 2, 1934.

GREGORY, HUNT & MELVIN,
WM. H. HUNT,
WARD SULLIVAN,
SULLIVAN, ROCHE, JOHNSON & BARRY,
THEO. J. ROCHE,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

SCHEDULE A

(Comprising 2 subdivisions)

Schedule of Drafts Claimed by Plaintiff to Have Been Deposited as Security for Acceptances Totaling $155,000.

Subdivision No. 1

Draft No.	Customer	Amount	Date Deposited	Date Paid
103004	Birla Bros. Ltd.	63,950.00	10/ 8/30	12/16/30
103006A	do	55,900.76	10/ 8/30	12/16/30
103009	Ricardo Velazquez	2,442.40	10/ 9/30	1/28/31
103010	Bottiger Trepp y Cia	11,031.14	10/10/30	12/31/30
103012	Buena y Cia	2,441.00	10/12/30	*
103023	Sociedad Automoviliaria	779.10	10/21/30	Unpaid
103026	Rafael Alvarez L. e Hijos	2,446.82	10/28/30	12/27/30
103029	The Nissho Co.	654.55	10/29/30	12/27/30
103030	Empres Dean	1,405.20	10/30/30	2/11/31
113001	Limon Trading Co.	1,209.40	11/ 6/30	2/3/31
113007	Julio Plesch & Co.	1,204.78	11/19/30	2/14/31
113010	J. C. Spedding	1,804.01	11/20/30	2/14/31
113011	Nottebohm Hermanos	103.12	11/20/30	12/13/30
113012	Bottiger Trepp y Cia	1,466.25	11/20/30	2/13/31
113013	Rafael Alvarez L. e Hijos	2,446.82	11/20/30	1/30/31
113014	The Nissho Co.	1,547.50	11/22/30	1/21/31
113017	J. C. Spedding	7,277.35	11/22/30	2/14/31
113019	Nottebohm Hermanos	291.50	11/25/30	12/12/30
113020	Raymundo Diaz	1,200.00	11/25/30	12/18/30
		159,600.50		

*2/24/31 $1500 net proceeds applied on acceptances.
4/7/31 470 " " paid to receiver.
5/11/31 471 " " retained by Bank.

Schedule Showing Drafts Claimed by Plaintiffs to Have Been Deposited as Security for Each Acceptance or Group of Acceptances Executed and Released.

Subdivision No. 2

Draft No.	Date Deposited	Amount	
103004	10/8/30	$63,950.00	
103006A	10/8/30	55,900.76	$119,850.76
Nine acceptances released Oct. 8, 1930, aggregating			115,000.00
	Surplus amount of above two drafts		4,850.76
103009	10/ 9/30	2,442.40	
103012	10/12/30	2,441.00	4,883.40
	Reserve for Acceptances		9,734.16
One acceptance released Oct. 15, 1930, in amount of $5,000 against above reserve of $9,734.16			5,000.00
103010	10/10/30	11,031.14	
One acceptance released Oct. 21, 1930, in amount of $10,000 against above draft of $11,031.14			10,000.00

Five drafts above specified, viz.:		63,950.00
		55,900.76
		2,442.40
		2,441.00
		11,031.14
		135,765.30
Deduct acceptances issued		130,000.00
Surplus of above five drafts		5,765.30
103023	10/21/30	779.10
103026	10/28/30	2,446.82
103029	10/29/30	654.55
103030	10/30/30	1,405.20
113001	11/ 6/30	1,208.40
113007	11/19/30	1,204.78
113010	11/20/30	1,804.01
113011	11/20/30	103.12
113012	11/20/30	1,466.25
113013	11/20/30	2,446.82
113014	11/22/30	1,547.50
113017	11/22/30	7,277.35
113019	11/25/30	291.50
113020	11/25/30	1,200.00
		29,600.50

Four acceptances released Nov. 28, 1930, aggregating $25,000 against above drafts commencing with No. 103023 and ending with No. 113020.

SCHEDULE B

Schedule Relating to Correspondence Authorizing Release of Acceptances Aggregating $130,000 and Claimed by Plaintiff to Show the Particular Drafts Deposited With Bank and Upon Which Said Acceptances Were Executed and Released.

1. Letter dated Oct. 7, 1930, authorizing release of acceptances totaling $115,000, all dated Oct. 8, 1930. (Deft's. Ex. A.)

Draft	Amount	
103004	63,950.00	
103006A	55,900.76	$119,850.76

Acceptances released as follows: (Plff's. Ex. 17)

Date	Amount	Due Date	
Oct. 8, 1930	25,000	Jan. 6, 1931	
"	25,000	"	
"	10,000	"	
"	10,000	"	
"	10,000	"	
"	10,000	"	
"	10,000	"	
"	10,000	"	
"	5,000	"	115,000.00

Amount of above two drafts deposited in excess of acceptances totaling $115,000 $ 4,850.76

2. Letter dated Oct. 13, 1930, authorizing release of acceptance for $5000. (Plff's. Ex. 28.)

Draft	Amount	
103009	2,442.40	
103012	2,441.00	4,883.40
	Total	$9,734.16

Acceptance released as follows: (Plff's. Ex. 18)

Date	Amount	Due Date
Oct. 15, 1930	5,000	Jan. 13, 1931

3. Letters dated Oct. 20 and 21, 1930, authorizing release of acceptance totaling $10,000. (Plff's. Exs. 30 and 31.)

Draft	Amount
103010	$11,031.14

Acceptance released as follows: (Plff's. Ex. 19)

Date	Amount	Due Date
Oct. 21, 1930	10,000	Jan. 19, 1931

SCHEDULE C

Schedule Showing Drafts Claimed by Plaintiff Not to Have Been Deposited as Security for Acceptances Totaling $155,000.

A

Drafts Deposited on or Prior to Nov. 28, 1930

No.	Amount	Date of Deposit	Reason
103005	63,950.00	10/8/30	180 days' sight
103006B	55,900.75	10/8/30	" " "
103024	1,007.00	10/28/30	Returned—goods not shipped
103025	583.00	10/28/30	Paid to R. O. Co. 11/15/30
103028	1,204.78	10/28/30	Returned—goods not shipped
103027	381.60	10/28/30	Estimated that proceeds would not be received in San Francisco prior to Feb. 26, 1931, maturity date of acceptances for $25,000.
113008	1,007.00	11/19/30	
113009	5,256.60	11/19/30	
113018	641.25	11/23/30	
113021	2,237.66	11/25/30	Deposited after request for issuance of acceptances totaling $25,000.
113023	881.13	11/28/30	

B

Drafts Deposited Subsequent to Nov. 28, 1930

123007	1,007.00	12/23/30	Already sufficient drafts under acceptance
123008	2,446.82	12/24/30	"
123009	3,418.90	12/24/30	"
123010	1,266.29	12/24/30	"
123013	2,702.66	12/28/30	"
123014	1,219.00	12/28/30	"
123015	2,692.99	1/7/31	"
13103	53.45	1/7/31	"
13106	11,107.50	1/9/31	"
13107	23,607.50	1/9/31	180 days' sight "
13108	1,197.81	1/15/31	" " " "

SCHEDULE D

Schedule of Correspondence Claimed by Plaintiff to Show Application by Wells Fargo Bank of Proceeds of Drafts to Acceptances Totaling $155,000.

1. Letter dated Dec. 16, 1930: (Plff's. Ex. 93)

Draft No. 103004	$ 63,950.00
" " 103006A	55,900.76
	119,850.76
Less Charges	224.71
Net Proceeds	$119,626.05

Applied in anticipation of maturing acceptances.

2. Letter dated Jan. 3, 1931: (Plff's. Ex. 95)

Draft No. 103010	$ 11,031.14
Less Charges	40.07
Net Proceeds	$ 10,991.07

Applied in anticipation of maturing acceptances.

3. Letter dated Jan. 26, 1931: (Plff's. Ex. 97)

Draft No. 113014	$ 1,547.50
Credit Interest	15.01
	1,562.51
Less Charges	1.93
Net Proceeds	$ 1,560.58

Applied in anticipation of acceptances for $25,000 maturing Feb. 26, 1931.

4. Letter dated Jan. 26, 1931: (Plff's. Ex. 97)

Interest credit memo on acceptance for $5.00 credited to acceptance fund.

5. Letter dated Jan. 28, 1931: (Plff's. Ex. 98)

Draft No. 103009		$ 2,442.40
Credit Interest		45.20
		2,487.60
Less Charges		3.11
Net Proceeds		$ 2,484.49

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

6. Letter dated Feb. 2, 1931: (Plff's. Ex. 99)

Draft No. 113013		$ 2,446.82
Less Charges		3.05
Net Proceeds		$ 2,443.77

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

7. Letter dated Feb. 3, 1931: (Plff's. Ex. 100)

Draft No. 113001		$ 1,208.40
Less Charges		13.59
Net Proceeds		$ 1,194.81

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

8. Letter dated Feb. 4, 1931: (Plff's. Ex. 101)

Draft No. 113023		$ 881.13
Credit Interest		9.85
		890.98
Less Charges		1.10
Net Proceeds		$ 889.88

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

9. Letter dated Feb. 13, 1931: (Plff's. Ex. 103)

(a) Draft No. 113012	$ 1,466.25
Less Charges	6.17
Net Proceeds	$ 1,460.08
(b) Draft No. 123007	$ 1,007.00
Credit Interest	14.10
	1,021.10
Less Charges	1.28
Net Proceeds	$ 1,019.82
(c) Draft No. 103030	$ 1,405.20
Less Charges	8.93
Net Proceeds	$ 1,396.27

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

10. Letter dated Feb. 14, 1931: (Plff's. Ex. 104)

(a) Draft No. 113010	$ 1,804.01
Credit Interest	27.31
	1,831.32
Less Charges	2.25
Net Proceeds	$ 1,829.07
(b) Draft No. 113017	$ 7,277.35
Credit Interest	107.68
	7,385.03
Less Charges	7.38
Net Proceeds	$ 7.377.65
(c) Draft No. 113007	$ 1,204.78
Credit Interest	18.48
	1,223.26
Less Charges	1.50
Net Proceeds	$ 1,221.76

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

11. Letter dated Feb. 26, 1931: (Plff's. Ex. 107)

(a)	Draft No. 113009	$ 5,256.60
	Reduced as per letter of 2/7/31	4,711.43
	Less Charges	44.45
	Net Proceeds	$ 4,666.98
(b)	Draft No. 113018	$ 641.25
	Credit Interest	9.62
		650.87
	Less Charges	.81
	Net Proceeds	$ 650.06
(c)	Draft No. 123008	$ 2,446.82
	Less Charges	3.05
	Net Proceeds	$ 2,443.77
(d)	Draft No. 103012	$ 2,441.00
	Paid on account	1,500.00
	Less Charges	11.53
	Net Proceeds	$ 1,488.47

Recapitulation as to Proceeds of Drafts Referred to in Item 11 (Supra).

Net Proceeds	(a)	$4,666.98
	(b)	650.06
	(c)	2,443.77
	(d)	1,488.47
Total Net Proceeds		$9,249.28
Balance due on Acceptances of $25,000		1,499.70
Net Proceeds after payment of acceptances in full		$7,749.58

Held temporarily by Bank in accord with letter dated Feb. 26, 1931. (Plff's. Ex. 107.)

Subsequently restored to Receiver in accord with Bank's letter of Mar. 5, 1931. (Plff's. Ex. 108.)

SCHEDULE E

Recapitulation of Application of Net Proceeds of Drafts in Payment of Acceptances Aggregating $155,000 as Disclosed by Foregoing Letters of Bank.

Item No.	Amount
1	$119,626.05
2	10,991.07
3	1,560.58
4	5.00
5	2,484.49
6	2,443.77
7	1,194.81
8	889.88
9 (a)	1,460.08
(b)	1,019.82
(c)	1,396.27
10 (a)	1,829.07
(b)	7,377.65
(c)	1,221.76
11 (a)	4,666.98
(b)	650.06
(c)	2,443.77
(d)	1,488.47
	$162,749.58
Surplus Credits to Receiver	7,749.58
Total Applied in Full Payment of Acceptances	$155,000.00

SCHEDULE F

Schedule of Drafts Deposited With Wells Fargo Bank Prior to Receivership, Proceeds of Which Were Received by Bank After Receivership and a Portion Thereof Applied to Acceptances and Balance Credited to Receiver.

Draft No.	Customer	Amount of Draft	Net Proceeds	Date Proceeds Credited to Receiver
*103012	Bueno y Cia	2,441.00	$1,488.47	
113009	Limon Trading Co.	5,256.60	4,666.98	
113018	Miguel Duenas	641.25	650.06	
123008	Rafael Alvarez L. e Hijos	2,446.82	2,443.77	
			9,249.28	
	Deduct balance due on acceptance		1,499.70	
	Balance Credited Receiver		$7,749.58	3/5/31

SCHEDULE G

Schedule of Drafts Deposited With Wells Fargo Bank Prior to Receivership, Proceeds of Which Were Received by Bank Also Prior to Receivership and Credited to Account of Richfield Oil Company Without Right of Offset.

Draft No.	Gross Amount	Net Proceeds	Date Deposited	Date Paid
103025	$ 583.00	$ 576.12	10/27/30	11/15/30
103026	2,446.82	2,443.76	10/27/30	12/27/30
103029	654.55	660.68	10/28/30	12/27/30
113011	103.12	101.37	11/19/30	12/12/30
113019	291.50	287.78	11/24/30	12/12/30
113020	1,200.00	1,186.15	11/24/30	12/18/30
Total	$5,278.99	$5,255.86		

SCHEDULE H

Schedule of Drafts Deposited With Wells Fargo Bank Prior to Receivership, Proceeds of Which Were Received by Bank After February 26, 1931, and Credited to Account of Receiver Without Claim to Offset.

Draft No.	Gross Amount	Net Proceeds	Date Deposited	Date Paid
13106	$11,107.50	$11,082.51	1/8/31	3/5/31
13108	1,197.81	1,209.81	1/15/31	3/23/31
*103012	2,441.00	468.05	10/11/30	4/7/31
103027	381.60	387.35	10/27/30	3/9/31
113008	1,007.00	1,019.47	11/18/30	3/19/31
113021	2,237.66	2,223.53	11/24/30	3/23/31
123009	3,418.90	3,382.54	12/23/30	3/24/31
123010	1,266.29	1,264.71	12/13/30	4/4/31
123013	2,702.66	2,743.94	12/27/30	3/30/31
123015	2,692.99	2,682.22	12/27/30	4/22/31
Total		$26,464.13		

*On February 20, 1931, $1,500.00 was paid on account of this draft, the net proceeds amounting to $1,488.47 being applied towards payment of acceptances aggregating $25,000, as shown in Schedule D.

On April 7, 1931, $468.05 was paid on account of the balance due on this draft, $1,488.47 having been previously paid. This sum was credited to the account of the receiver. Subsequently, and on May 11, 1931, the balance, amounting to $471.00, was paid, which was retained by the Bank under its alleged lien or right of offset.

SCHEDULE I

Schedule Showing Total Proceeds of Drafts Paid to Richfield Oil Company and (or) to Receiver Without Claim of Offset.

Total proceeds of drafts paid to Richfield Oil Company, as per Schedule G	$ 5,255.86
Surplus proceeds of four drafts paid to Receiver after payment in full of acceptances, as per Schedule F	7,749.58
Total proceeds of remaining drafts paid to Receiver after payment in full of acceptances, as per Schedule H	26,464.13
Total	$39,469.57

SCHEDULE J

Schedule of Drafts Which Plaintiff Claims Were Deposited as Security for Acceptance Totaling $155,000 and Showing Proceeds of all Drafts Used to Liquidate Acceptances.

Draft No.	Gross Amount	Net Amount	Date Deposited	Date Paid
103004	$ 63,950.00)	$119,626.05	10/8/30	12/16/30
103006A	55,900.76)		10/8/30	12/16/30
103009	2,442.40	2,484.49	10/9/30	1/28/31
103010	11,031.14	10,991.07	10/10/30	12/31/30
103012	2,441.00	1,488.47	10/12/30	2/24/31
103023	779.10		10/21/30	Unpaid
103026	2,446.82	*	10/28/30	12/27/30
103029	654.55	*	10/29/30	12/27/30
103030	1,405.20	1,396.27	10/30/30	2/11/31
113001	1,208.40	1,194.81	11/6/30	2/3/31
113007	1,204.78	1,221.76	11/19/30	2/14/31
113010	1,804.01	1,829.07	11/20/30	2/14/31
113011	103.12	*	11/20/30	12/12/30
113012	1,466.25	1,460.08	11/20/30	2/13/31
113013	2,446.82	2,443.77	11/22/30	1/30/31
113014	1,547.50	1,560.58	11/22/30	1/21/31
113017	7,277.35	7,377.65	11/22/30	2/14/31
113019	291.50	*	11/25/30	12/12/30
113020	1,200.00	*	11/25/30	12/18/30
	$159,600.50	$153,074.07		

*Proceeds paid to Richfield Oil Company of California.

**113009	4,666.98	2/25/31
**113018	650.06	2/20/31
**113023	889.88	2/4/31
**123007	1,019.82	2/13/31
**123008	2,443.77	2/20/31
	$ 9,670.51	
	153,074.07	
	$162,744.58	
Interest memorandum 1/19/31	5.00	
	162,749.58	
Deduct acceptances	155,000.00	
Surplus paid receiver 3/5/31	$ 7,749.58	

**Note: Drafts claimed by plaintiff not to have been deposited as security for acceptances, but proceeds of which were applied by Bank to payment of acceptances.

SCHEDULE K

Schedule of Drafts and Proceeds of Drafts in Litigation.

Draft No.	Customer	Net Amount	Date Deposited	Date Paid
103005	Birla Bros. Ltd.)	$119,512.54	10/7/30	6/10/31
103006B	")			
123014	Ricardo Velazquez	1,245.11	12/27/30	5/18/31
103012	Bueno y Cia	469.06	10/11/30	*
13107	Birla Bros. Ltd.	23,532.08	1/8/31	9/10/31
		$144,758.79		

*$1500 paid 2/24/31.
470 paid 4/7/31.
471 paid 5/11/31 but withheld by Bank.

SCHEDULE L

Security-First National Bank of Los Angeles.

Schedule of Drafts—Not Discounted—Deposited Before Receivership, Proceeds of Which Were Paid and Credited to the Receiver's Account.

Draft No.	Face Amount	Date Deposited	Date Paid	Customer
93021	$ 37,138.50	9/17/30	5/21/31	Birla Bros. Ltd.
93026	1,038.80	9/21/30	4/22/31	Sociedad Automoviliaria
103002	572.40	10/3/30	7/27/31	" "
103018	53,941.49	10/18/30	4/7/31	H. C. Sleigh
13105	59,832.84	1/8/31	7/24/31	" " "
	$152,524.03	Total Funds Received from Undiscounted Collections		